

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

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MICHAEL CLOUD,

Plaintiff,

VS.

CASE NO. 3:20-cv-01277-S

THE BERT BELL/PETE ROZELLE  
NFL PLAYER RETIREMENT PLAN,

Defendant.

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TRANSCRIPT OF MOTION TO COMPEL  
HEARD BEFORE THE HONORABLE KAREN GREN SCHOLER  
UNITED STATES DISTRICT JUDGE

AUGUST 25, 2021

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A P P E A R A N C E S  
(Continued)

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P R O C E E D I N G S

(Call to order of the court.)

THE COURT: This is Civil Action  
Number 3:20-cv-01277-S, Cloud v. The Bert Bell/Pete Rozelle NFL  
Player Retirement Plan.

Counsel, please state your appearance. Let's  
start with the Plaintiff.

MR. DENNIE: Christian Dennie at Barlow Garsek & Simon,  
and I'm accompanied by Holden Cammack, a law clerk in our firm.

THE COURT: Okay. On behalf of Defendant.

MR. MEEHAN: Good afternoon, Your Honor. Edward  
Meehan, and with me is Nolan Knight.

THE COURT: Okay. And you're taking the lead today,  
right?

MR. MEEHAN: Yes, Your Honor.

THE COURT: So why don't you pull the microphone close  
to you.

So before the Court today is ECF Number 41,  
Michael Cloud's motion to compel. The Court has the motion,  
which is extensive. It's titled Plaintiff's Emergency Motion  
to Compel Compliance with Court's Order and Production of  
Documents and Records and Incorporated Brief in Support  
Thereof. It's ECF Number 41. ECF -- Defendant's opposition  
titled Defendant's Opposition to Plaintiff's Emergency Motion  
to Compel Compliance with Court's Order and Production of

1 Documents and Records, this is filed as ECF Document Number 46.  
2 And then the Plaintiff's reply titled Plaintiff's Reply in  
3 Support of Emergency Motion to Compel Compliance with Court's  
4 Order and Production of Documents and Records and Incorporated  
5 Brief in Support Thereof. It's filed as  
6 ECF Document Number 50. There are appendices and documents  
7 attached and those have been reviewed by the Court as well.  
8 All those are before the Court.

9 And so at this time it's your motion, Mr.  
10 Dennie. Go ahead.

11 MR. DENNIE: Thank you, Your Honor. I appreciate your  
12 time today. And I will admit to you from time to time when I  
13 have a mic, my voice drops down.

14 THE COURT: Pull the mic really close to you.

15 MR. DENNIE: 'Cause I think I'm being too loud. So if  
16 I get too quiet, just let me know. Okay?

17 THE COURT: Pull it close to you 'cause you're almost  
18 too quiet.

19 MR. DENNIE: How about now?

20 THE COURT: That's better.

21 MR. DENNIE: If I could, I'll just give you a little  
22 bit of background on factual issues and kind of where we are  
23 and then launch into what we're here to discuss.

24 So Michael Cloud is a former NFL football  
25 player. He is a graduate of Boston College. He was drafted in

1 the second round by the Kansas City Chiefs in 1999. He played  
2 for three teams in the NFL between 1999 and 2005, three teams  
3 being the Chiefs, the Patriots, and the Giants. Winning a  
4 Super Bowl with the Patriots that was following the 2003  
5 season, Super Bowl played in 2004.

6 What the real crux of this case and where it  
7 starts is Mr. Cloud was playing running back for the New York  
8 Giants on October 31st, 2004, in a game against the Minnesota  
9 Vikings in Minnesota. He was running left on a hand-off, gains  
10 about 11 yards in the fourth quarter, has a helmet-to-helmet  
11 collision that knocks him backwards to the ground. He couldn't  
12 get up, a teammate helped him to his feet and then walked him  
13 back to the huddle, then he went down.

14 Now, part of the thing with this case is we  
15 think in terms of what things are like now. Things were very  
16 different in 2004. A helmet-to-helmet collision was not a  
17 penalty. Now it's an ejection. A concussion that he received  
18 has a five-step process to return to play now. Then, there was  
19 no such process.

20 Mr. Cloud returned to football activities  
21 48 hours after his concussion and sustained further injury to  
22 the point to where in 2005 when he returned to play, he could  
23 not remember basic running back plays he'd been running since  
24 he was seven years old. Things like sweeps, dives, where to  
25 line up. No clue. Quarterbacks had to whisper in his ear what

1 he needed to do.

2 After the 2005 season, that concluded Mr.  
3 Cloud's play in the NFL. He never worked again. He attempted  
4 to serve as a personal trainer. He had a couple of spot  
5 personal training sessions here and there but could never  
6 regain any type of employment. And that's not just from  
7 concussions he received, but also from orthopedic injuries.

8 He had a number of major orthopedic injuries,  
9 one of which, as you've probably seen in the pleading, a big,  
10 large piece of muscle had to be removed from his shin in a  
11 surgery due to an infection he received while playing with the  
12 Patriots.

13 So that kind of brings us to where the facts  
14 are of the case. What we get to is a process that has been  
15 heavily disputed, fought about, congressional hearings, and  
16 that's the opportunity in how players obtain disability  
17 benefits. This has been an ongoing struggle, an ongoing battle  
18 for players for many years.

19 Mr. Meehan's firm developed the plan document  
20 in 1993, and they stayed on course ever since representing the  
21 Plan, representing Committee, representing the Board,  
22 representing the NFL Players Association all at the same time.  
23 And this is all in our brief. It's all cited with testimony.

24 So in 2009, Mr. Cloud applied for benefits for  
25 the first time. He was initially denied benefits but was later

1 granted what are called line of duty benefits, which is a much  
2 lower-level benefit. In 2004, he came back and asked for a  
3 total and permanent disability benefits, which is a much higher  
4 level. He received some total and permanent disability  
5 benefits.

6 In 2006, he came -- or excuse me -- 2016, he  
7 came back and requested reclassification of those benefits to  
8 what are called active football benefits under the terms of the  
9 Plan in Article 5. That's what this dispute is about. It is  
10 the reclassification decision in the plan, which is  
11 Section 5.7(b) of the plan. It requires the player to  
12 establish by clear and convincing evidence a changed  
13 circumstance. Neither clear and convincing evidence or changed  
14 circumstance is defined in the plan.

15 What was eerie and odd and completely appalling  
16 is none of the people that have provided deposition testimony  
17 can tell me where the changed circumstances language came from,  
18 including Chris Smith who has been on the Committee since its  
19 inception in 2006. The next thing that's appalling in this  
20 process, the Committee and the Board ultimately rendered  
21 decisions and a written letter is provided. They never see the  
22 letter. They never comment on the letter. They don't write  
23 the letter. They don't make any changes to the letter. And  
24 never see it before it goes to the player.

25 And in Ms. Smith's case, she said she never saw



1 the letters that she supposedly granted or -- granted or denied  
2 in this case. Never saw them anytime before the preparation  
3 for this deposition that we talked about.

4 So, so far what we've done is we've deposed  
5 three people. This Court on July 22nd gave us authority to  
6 depose Chris Smith and Patrick Reynolds, both of whom are on  
7 the Disability Initial Claims Committee. They have an acronym  
8 and they call it something, but I call it the "Committee."

9 So those two people have been deposed. I've  
10 cited to you in our -- in our reply brief 'cause at the time we  
11 filed our initial brief we didn't have the transcripts. But we  
12 cited to you all of this odd, weirdness that occurred.

13 And I'll be frank with you, Your Honor, I'm a  
14 sports and entertainment attorney. I'm not a full-time ERISA  
15 lawyer. I'm not going to run into Mr. Meehan in another case.  
16 I'm a sports and entertainment attorney. Like you were before  
17 you were on the bench, I'm a AAA arbitrator that handles a lot  
18 of sports and entertainment cases. I've seen a lot. I've  
19 represented panels. I've represented committees. I've  
20 represented boards.

21 I have never been in a circumstance where I've  
22 seen people that decide a case, in theory decide the case, not  
23 ever see their decision. Never read it. Never have a copy of  
24 it. Don't really know what's in it. Testify that they didn't  
25 give the definition of changed circumstance that's in the -- in

1 the document. That's not what they said. Nobody asked them if  
2 that was the definition they would apply.

3 And, in fact, in their deposition they said --  
4 and specifically Ms. Smith -- said Mr. Cloud did meet the  
5 definition of changed circumstance as used in Section 5.7(b) of  
6 the plan.

7 So we've got this process that is extremely  
8 odd. People that really don't know what is going on. Mr.  
9 Reynolds, I believe by calculation, is about 26 when he got on  
10 to the Committee and was fresh out of college, a couple of  
11 years at the NFL.

12 So we get to this point and now we're to the  
13 point of Mr. Cloud has appealed the denial of his  
14 reclassification request made by the Board -- or by the  
15 Committee, I should say. He's appealed that to the Board. The  
16 Board consist of three people appointed by the NFL Management  
17 Council, which are all -- three individuals that work for NFL  
18 teams and then three people that are appointed by the NFL PA,  
19 the union for the players, which are all former NFL players.

20 There are some minutes in this case that show  
21 that the decision they made to deny Mr. Cloud his  
22 reclassification benefits was based on he didn't meet the  
23 changed circumstances language --

24 THE COURT: All right. Let me stop you.

25 MR. DENNIE: Yes, ma'am.

1 THE COURT: Don't lose your train of thought, okay?

2 MR. DENNIE: Okay.

3 THE COURT: So who was on the committee --

4 MR. DENNIE: Yeah. Sure.

5 THE COURT: -- that denied -- what I'm talking about,  
6 we're floating a lot of the dates out here -- 2016. We're  
7 talking about --

8 MR. DENNIE: Okay. Correct.

9 THE COURT: -- the 2016 reclassification.

10 MR. DENNIE: Yeah. The committee -- the committee  
11 members were the same in '14 and '16.

12 THE COURT: Okay. Who were on the committee? How many  
13 people?

14 MR. DENNIE: Two.

15 THE COURT: And who were they?

16 MR. DENNIE: Patrick Reynolds and Chris Smith.

17 THE COURT: They were the only --

18 MR. DENNIE: Only two people.

19 THE COURT: Only two people.

20 Okay. And then it goes to the Board, and  
21 you've identified six people.

22 MR. DENNIE: Correct. And those are --

23 THE COURT: Those are the six that were on the Board  
24 that agreed with the Committee?

25 MR. DENNIE: At that time. Those people are different

1 now --

2 THE COURT: All right.

3 MR. DENNIE: -- but the six that we're seeking to  
4 depose are those people --

5 THE COURT: That's what I'm asking.

6 MR. DENNIE: Yes.

7 THE COURT: Okay.

8 MR. DENNIE: Yeah. Katie Blackburn --

9 THE COURT: All right. And so only two people in the  
10 committee, according to you, didn't see the decision, a copy of  
11 the decision, didn't know the definitions of the documents, and  
12 really didn't see any of the medical records, right?

13 MR. DENNIE: I didn't say the medical records. They  
14 don't recall what they saw. What -- what Ms. Smith testified  
15 to was she may not have read all of Mr. Cloud's medical records  
16 before making a decision.

17 THE COURT: Okay. I think I saw that. But then the  
18 Committee, what they do is -- then it goes to the Board?

19 MR. DENNIE: Correct.

20 THE COURT: And that's called an appeal to the Board?

21 MR. DENNIE: Appeal of the reclassification, yes,  
22 ma'am.

23 THE COURT: Okay. And they're the six individuals that  
24 you choose to depose?

25 MR. DENNIE: Those are the ones we're requesting.

1 THE COURT: All right. And this is a very narrow  
2 question I'm going to ask you.

3 I'm going to ask you, Mr. Meehan, to listen up.

4 But what is the Board supposed to do? Are they  
5 supposed to take a fresh look? Is it a de novo review of what  
6 the Committee did? Or is it just -- you know, what's the  
7 standard of the Board's review of the Committee? Do you know.

8 MR. DENNIE: Your Honor, my understanding is  
9 Section 5.7(b) of the plan does not state one way or another.  
10 But based on, you know, what I understand from getting through  
11 this process is they essentially give a de novo review. They  
12 start over and look at the records on their own.

13 THE COURT: Mr. Meehan?

14 MR. MEEHAN: Yes, Your Honor, I agree with that. The  
15 Board's practice is to take a fresh look or a de novo review.

16 THE COURT: Okay. So, you know, analogizing to the  
17 Court, you know -- if the court of appeals takes a de novo  
18 review of what I do or what I do takes a de novo review of what  
19 a magistrate judge does, that means you take a fresh look and  
20 basically start all over and make your own decision. So are we  
21 in agreement what de novo review means?

22 MR. MEEHAN: Yes, ma'am.

23 THE COURT: As far as the Board.

24 MR. MEEHAN: As far as the Board, yes.

25 THE COURT: Is that defined anywhere on their standard

1 of review?

2 MR. MEEHAN: I do not know offhand. I'm sorry.

3 THE COURT: You don't know -- now, is it true what he  
4 said, that your law firm created the plan, has been involved in  
5 the plan since 1993?

6 MR. MEEHAN: My understanding is that lawyers at my law  
7 firm were principal drafters, but I am not personally familiar  
8 with that process.

9 THE COURT: Okay. All right. But you're familiar with  
10 the plan, right?

11 MR. MEEHAN: Yes.

12 THE COURT: Very?

13 MR. MEEHAN: Yes.

14 THE COURT: And you can't tell me right now what the  
15 standard of review of the Board to the Committee is?

16 MR. MEEHAN: My understanding is the practice is as  
17 we've described, but I cannot at the moment cite a provision of  
18 the plan that speaks directly to that issue.

19 THE COURT: Do you think it exist, seriously? 'Cause  
20 I'm going to go look for it. You can save me some work.

21 MR. DENNIE: It does not.

22 MR. MEEHAN: I would be happy to look for it, but  
23 offhand I don't -- I don't know of a provision on that point.  
24 I think it's more a practice that has --

25 THE COURT: So it's a practice that everybody assumes

1 is a de novo review, but there's nothing in the plan that tells  
2 the board members what they should be doing?

3 MR. MEEHAN: I can't say yes or no, Your Honor -- I  
4 apologize -- without having to look at the plan, but I believe  
5 that that is correct.

6 THE COURT: And the practice of the Board -- and you're  
7 real familiar with generally. I'm not talking about Michael  
8 Cloud's case, but I will be talking. It's supposed to be -- I  
9 mean, it's only fair, isn't it, that they just take a fresh  
10 look? And they're supposed to appeal -- something that's this  
11 important, they're supposed to look at everything, right, de  
12 novo?

13 MR. MEEHAN: Your Honor, what -- as the Court said,  
14 whether it's, quote, only fair, end quote, what I do understand  
15 is that it is the practice to --

16 THE COURT: It is the practice. Okay.

17 MR. MEEHAN: Yes.

18 THE COURT: So it wouldn't be the practice if they just  
19 rubber stamped it?

20 MR. MEEHAN: That is correct. And my understanding is  
21 that they do not simply rubber stamp.

22 THE COURT: Okay.

23 MR. MEEHAN: They take an independent assessment.

24 THE COURT: Okay. Thank you.

25 Go back to what you were discussing before.

1       Okay. So a committee of two people reviewed Mr. Cloud's -- I  
2       may be getting some of this terminology wrong, but request for  
3       reclassification, right?

4               MR. DENNIE: Yes, Your Honor.

5               THE COURT: That was denied?

6               MR. DENNIE: Correct.

7               THE COURT: You deposed those two people and they  
8       testified as they testified, and then it's appealed to the  
9       Board. Continue.

10              MR. DENNIE: Okay. So then you go to the Board. The  
11      Board reviews the same set of documents, in theory. And  
12      where --

13              THE COURT: Well, we don't -- we don't know that.

14              MR. DENNIE: That's --

15              THE COURT: 'Cause nobody in this room has been able to  
16      tell me what the Board's obligations are when they review the  
17      Committee's decisionmaking. But go on.

18              MR. DENNIE: It is not in the plan, to my knowledge.

19              THE COURT: Okay.

20              MR. DENNIE: I reviewed the plan -- I haven't been able  
21      to ask them the question yet. And, frankly, the three people  
22      that have been deposed, the two committee members and the  
23      corporate representative, can tell me nothing about what the  
24      Board did in this case. So what I'm looking --

25              THE COURT: And I think you represented in your



1 materials that it's the Plaintiff's position that the  
2 Committee and, because you deposed them, and possibly the  
3 Board, didn't have access to all of Michael Cloud's medical  
4 records?

5 MR. DENNIE: That's correct. That's our position for  
6 certain. And kind of dovetailing off of that, if you recall --

7 THE COURT: All right. So --

8 MR. DENNIE: Yeah.

9 THE COURT: -- we have a reclassification that's  
10 dependent on an analysis of many things, including whether or  
11 not there's brain injury to Michael Cloud. You agree?

12 MR. DENNIE: Correct.

13 THE COURT: You agree, Mr. Meehan?

14 MR. MEEHAN: That the basis of his reclassification was  
15 brain injury?

16 THE COURT: No, no. The Board's supposed to review and  
17 analyze whether or not there was a brain injury to Michael  
18 Cloud.

19 MR. MEEHAN: Your Honor, I would say the Board --

20 THE COURT: I'm not talking about the Board. The  
21 Committee.

22 MR. MEEHAN: It would be the same for -- for both. But  
23 the Committee -- the Committee is to review the application for  
24 benefits and to make a determination as to whether, based on  
25 the information presented, the applicant is entitled to

1 benefits.

2 THE COURT: Is it undisputed that not all of the  
3 medical records were presented to the Committee or the Board  
4 that -- that relate to Michael Cloud and his physical condition  
5 or damage from playing in the NFL?

6 MR. MEEHAN: No. That is disputed, Your Honor.

7 THE COURT: That is disputed?

8 MR. MEEHAN: Yes.

9 THE COURT: You're saying they have everything?

10 MR. MEEHAN: I have to answer it a little bit  
11 differently rather than a yes or no, is -- is that the way the  
12 process -- and I'll be brief 'cause I know my turn is yet to  
13 come. But the way the process works is the applicant is  
14 allowed and encouraged to present, in essence, anything the  
15 applicant believes.

16 THE COURT: I understand that. My question is: It's  
17 undisputed that whether the applicant presented the medical  
18 documents, or you got it from some other means, that not all of  
19 the medical records were before the Committee or the Board?

20 MR. MEEHAN: No. That is -- that is disputed. There  
21 is an allegation --

22 THE COURT: But there are other medical records out  
23 there?

24 MR. MEEHAN: There's an allegation that there's one  
25 specific medical record out there. We do not know whether it

1 exists, but we recognize there's an allegation of it. Neither  
2 the Committee nor the Board ever reviewed it and has never seen  
3 it and does not have it and does not have access to it. And we  
4 don't know whether it exists, but we know the Plaintiff says it  
5 does.

6 THE COURT: So the Plan's position is that Michael  
7 Cloud have all the -- the Committee or the -- and/or the Board  
8 have all the medical records of Michael Cloud before it?

9 MR. MEEHAN: The Defendant's position is that Plaintiff  
10 has alleged that there's one medical record that no one has  
11 seen that exists. That medical record, we don't know whether  
12 it exists. And it was never reviewed and never presented. And  
13 as a matter of law --

14 THE COURT: I'm just trying to get to a simple point.

15 MR. MEEHAN: Well, what I'm getting at is --

16 THE COURT: What I'm -- excuse me.

17 MR. MEEHAN: Sorry.

18 THE COURT: Reading all the papers in this case, there  
19 appears that there is a possibility and probability that there  
20 are medical records that are out there that were never before,  
21 rightly or wrongly, before the Committee or the Board. I'm  
22 just trying to establish what we can say is undisputed.

23 Are you disputing, or are you saying you don't  
24 know that there's other medical records that were present in  
25 2016 other than one document?

1 MR. MEEHAN: I -- I am saying that there is one medical  
2 document that has been described as existing. I believe there  
3 are other facts to suggest that there is no such document, but  
4 in any event, it was never presented to the Committee or the  
5 Board and therefore could not be considered.

6 THE COURT: Okay. So you are disputing that -- despite  
7 all these other doctor visits that are outlined in the  
8 Plaintiff's briefing and pleadings, you're disputing that those  
9 medical records even exist.

10 MR. MEEHAN: I am -- I am actually trying to be even  
11 more precise. There are a lot of broad statements in the  
12 Plaintiff's papers. When you look at the specifics, there is  
13 one and only one medical record that is alleged to exist  
14 that -- that was not presented.

15 THE COURT: And which one is that?

16 MR. MEEHAN: That's the -- the allegation that at some  
17 point in 2005 while Plaintiff was playing for the New England  
18 Patriots, the team conducted what is known as an impact exam,  
19 which is a -- an examination of an individual concerning the  
20 effects of concussions. So there's an allegation that the  
21 Patriots conducted that exam in 2005 at some point. There are  
22 reasons, which I can get to, to question whether that really  
23 occurred. But in any event, that exam, if it existed or  
24 exists, was never presented and therefore never considered.  
25 And as a matter of law, we would say it was not our duty to

1 obtain it.

2 THE COURT: So my effort to try to get you to answer  
3 the direct question has just been kind of a waste of time on my  
4 part. There have been medical visits that are outlined in the  
5 Plaintiff's pleadings. They talk about doctor visits,  
6 multiple. And my common sense and life experiences is that  
7 every time I go to a doctor, the doctor makes record of it.  
8 Probably more records than we even want.

9 So you're saying that there's only one record  
10 that's out there that you don't dispute exist?

11 MR. MEEHAN: No, Your Honor. And I'm sorry to belabor  
12 this, and I don't mean to try the Court's patience. But all  
13 medical records known to the Plan have been turned over to  
14 Mr. Cloud. There is one record, the Patriots' impact exam,  
15 which the Plaintiff says exists. We have no knowledge as to  
16 whether it --

17 THE COURT: Can you agree with me that if Mr. Cloud  
18 went and visited all these doctors, that he -- that his lawyer  
19 says he visited, that those would have created medical records  
20 that were not before the Plan -- I'm sorry -- before the  
21 Committee or the Board?

22 MR. MEEHAN: No, Your Honor, I can't. My understanding  
23 is all those records were turned over to Mr. Cloud. So to  
24 the -- to the extent they existed, they would have been  
25 considered.

1 THE COURT: I'm not saying what's in -- in the  
2 possession of the Committee or the Plan or the Board. I'm just  
3 saying that if Mr. Cloud went to see a doctor yesterday, there  
4 would be medical records that were created that are out there  
5 that are not before the -- that were not before the Committee  
6 or the Board, correct? That's all I'm trying to do. There are  
7 some medical records that are out there that the Committee or  
8 the Board or your law firm didn't have the benefit of.

9 MR. MEEHAN: I don't believe that to be true, Your  
10 Honor.

11 THE COURT: Okay. So -- all right.

12 MR. MEEHAN: That's not based on the information that I  
13 have. There are allegations but no support for it.

14 THE COURT: All right. Go ahead.

15 So it is disputed that there are no medical  
16 records, that they don't have, that wasn't presented that  
17 relate to all the things that you are saying, other than one  
18 document that may or may not exist relating to the 2005  
19 New England Patriots' impact exam.

20 You can continue.

21 MR. DENNIE: So, Your Honor, I'll just follow up on  
22 that point for a second, then I'll jump back.

23 THE COURT: Okay.

24 MR. DENNIE: If I may.

25 THE COURT: Go ahead.

1 MR. DENNIE: So the impact exam that was done on  
2 Mr. Cloud in 2005 by the Patriots, the interesting part about  
3 that is it was developed by a doctor named Grant Iverson, who  
4 is also involved in creating the concussion standards from the  
5 Third Circuit concussion case. So, I mean, it's -- it's all  
6 weaved in there. But one of the major points of this case is  
7 the fact that there's an NFL repository of documents.

8 If you read earlier filings in this case, the  
9 Groom law firm fought tooth and nail indicating there is no  
10 repository. Well, then you depose Patrick Reynolds who, for  
11 most of the time he was on the Committee, worked for the NFL,  
12 he says, sure, there's a repository. Then you depose Chris  
13 Smith who works for the NFL Players Association and she says,  
14 oh, yeah, sure, there's a repository. And then you depose the  
15 corporate representative who works for the Plan office and he  
16 goes, oh, yeah, it's called the EMR repository. So there's a  
17 repository of information.

18 And all sports have this, where they compile  
19 electronic records so when you go from one team to the other,  
20 they can just transfer with a button so everybody knows how  
21 these highly-skilled athletes have been trained, have been  
22 hurt. You know, whatever the issues are, it's all there.

23 THE COURT: Okay. But Mr. Meehan is disputing that  
24 this impact exam by the Patriots in 2005 -- I mean, he's  
25 casting a lot of doubt it even exist. What do you say about

1       that?

2               MR. DENNIE: I think that's -- that is extremely sad  
3       and unfortunate to say that Michael Cloud made up that he was  
4       having concussion-related symptoms and issues in 2005 to the  
5       point to where he just created that he sat for a 2005 impact  
6       exam.

7               THE COURT: Okay.

8               MR. DENNIE: We can't find the record. We don't know  
9       where it went. We have no idea. We've asked for it. We tried  
10      to get it from the Patriots. We tried to get it from them.  
11      Where is it? We don't know.

12              THE COURT: Okay.

13              MR. DENNIE: But he sat for the exam and then later he  
14      got cut for not remembering a play. So I don't know why they  
15      take the position. They said some critical things about that  
16      in the filing to this Court in opposition which, again, I think  
17      is sad.

18              THE COURT: Do you have anything that corroborates  
19      that, besides his word, that Mr. Cloud sat for the impact exam?

20              MR. DENNIE: We don't have a document, Your Honor.  
21      Only -- only thing we can point to is Mr. Cloud's testimony --

22              THE COURT: Okay.

23              MR. DENNIE: -- that he sat for the impact exam.

24              THE COURT: Okay. Well, why don't you continue.

25              MR. DENNIE: Okay. So going back to the Board level.



1 The Board level is considering Section 5.7(b) of the plan  
2 document the same way the Committee did and making a decision  
3 on that. We believe there were highly questionable issues at  
4 the Board level, like there were at the Committee level. But  
5 what we -- where we're really getting into an issue is if you  
6 look at the minutes, which we put in -- I believe it's  
7 Appendix 7 of our reply brief. The minutes reference that  
8 Mr. Cloud didn't meet the requirements of 5.7(b).

9 If you look at Appendix 6, which is their  
10 opinion letter, it goes into all these other things. It  
11 doesn't mention anything else in the minutes but has all this  
12 other stuff in the letter.

13 So when I'm talking to Sam Vincent, who's the  
14 corporate representative, and asked him, Who drafted that?  
15 Groom firm. Did any of the members of the Board actually  
16 review this before it was sent? No.

17 Somebody completely different, not on the  
18 Board, not the Groom firm, but another employee of the Plan  
19 signs the letter. Did he write it? No. Did anybody on the  
20 Board make any comments? Are there any other comments in  
21 addition to what's in the minutes as to how they arrived at  
22 this alleged decision? No.

23 So this is part of the issue that we have in  
24 this case. The true corporate representative that should have  
25 been deposed in this lawsuit, from the Groom firm. And I don't

1 throw stones at the lawyers. I'm not hyperbolic. That's just  
2 not my style. But all the information in this case in  
3 preparation of the corporate rep is the Groom firm. They  
4 provided -- prepared him a 132-page binder that he was  
5 literally reading from in the deposition.

6 And we get to a point to where nobody knows  
7 what the Board did. The two committee members, they weren't at  
8 the board meeting. They didn't have any conversations with the  
9 Board, according to them. Mr. Vincent, who was at the board  
10 meeting, can't determine what they did, how they did, did they  
11 meet in executive session, did they announce it, their decision  
12 in open -- openly in the board meeting. None of that.

13 The only people that can tell us what happened  
14 in the board meeting, and all three of those witnesses  
15 testified to the same, is those board members. Those six that  
16 we've identified -- three from the NFL side, three from the  
17 players association side. Those are the only people that know  
18 how they came to a decision on Mr. Cloud's case.

19 And, remember, we already have an admission  
20 from the committee members saying Mr. Cloud did meet the terms  
21 of changed circumstances as used in Section 5.7(b), and my  
22 definition is different than what appears in this letter that I  
23 never saw, didn't write, and didn't make any changes to.

24 So we're in this vortex here where the  
25 controlling party of the information is the Groom firm.

1 They're trying to shield the board members who are probably  
2 going to testify similarly to what the committee members said  
3 about their decision, they didn't really do much. And we can't  
4 get that information 'cause they're blocking it. They're  
5 blocking any opportunity for us to get the information that we  
6 need to make a determination on how they got to that decision.  
7 And they want to cite you the cases that say look at the letter  
8 that was written, look at the letter that was written.

9 The problem is we already have testimony that  
10 the very people that allegedly made the decision did not review  
11 or have access to the letter that was sent to Mr. Cloud. And  
12 I'll be honest with you, I have advised panels in the sports  
13 industry, major industry groups. I written orders. But there  
14 is not a -- not a single chance, ever, that I would write an  
15 order without taking their comments, sending it to them for  
16 review, and having them provide their own analysis. That's not  
17 a law firm's job, but that's what happened here at every level.

18 So we're in this -- this space where all the  
19 information is the Groom firm. None of these people know  
20 anything. But I haven't had the -- at least that I deposed so  
21 far. I haven't had that opportunity to go and depose those  
22 board members, and that's critical, critical to determining if  
23 they met their requirements under ERISA, whether they gave a  
24 full and fair review, whether they acted arbitrary and  
25 capriciously, whether there's inconsistent review. Those are

1 the key issues.

2 And our position, Your Honor, is on July 22nd  
3 in Docket Number 38, you've already ruled on that. You've  
4 given us the opportunity to determine whether they complied  
5 with ERISA regulations. You've already made that  
6 determination. You didn't say it's only written discovery or  
7 you can't have deposition. You said we're entitled to seek  
8 discovery on those issues.

9 And based on my reading of your order, it's  
10 very close to what was decided in the *Vega* and *Crosby* cases,  
11 which are the two major Fifth Circuit cases on ERISA discovery.  
12 And neither of those cases talked about whether it was written  
13 or oral depositions as to what we could get.

14 These are huge issues for Michael Cloud. This  
15 is a disabled, total and permanently disabled gentleman that  
16 played in an era before concussions were recognized. The NFL  
17 didn't recognize concussions as a disability, stating injury  
18 until 2009. And that came -- if you've seen the movie  
19 *Concussion* -- that came after Bennett Omalu studied Mike  
20 Webster's brain and created or came up with the term "CTE."  
21 And also as an aside, by the way, the Plan also denied  
22 Mr. Webster's claim for benefits before the Fourth Circuit  
23 overturned some decisions.

24 This is a standard game plan for them, is to --  
25 to deny, deny, deny people that are disabled that are entitled

1 to the benefits. And the important thing to understand is, who  
2 are the beneficiaries of the plan? The NFL players. Michael  
3 Cloud, beneficiary of the plan. Who are the fiduciaries? The  
4 board members. Those are the people.

5 So all this conversation that we're probably  
6 going to hear about us requesting a counsel report and how  
7 that's attorney-client privilege, I'll pump the brakes on that.  
8 If you look at the case law, the actual client that the Groom  
9 firm was representing were the beneficiaries of the plan, not  
10 the board members. So whatever advice they gave them on the  
11 administration of claim, they're trying to apply that to the  
12 wrong people.

13 And I'll cite you to the *Wildbur* case, which is  
14 a big Fifth Circuit case. 974 F.2d 631. A very recent case  
15 out of the Northern District in 2020 which also involves a NFL  
16 plan. *Advanced Physicians v. Connecticut General Life*  
17 *Insurance*, 431 F.3d 857.

18 THE COURT: What are these cases that you're citing?  
19 What proposition are they supposed to support?

20 MR. DENNIE: Say that one more time, Judge. I'm sorry.

21 THE COURT: Why are you citing these cases?

22 MR. DENNIE: Because the -- what you're probably going  
23 to hear is them make arguments that certain things that we're  
24 going to need to get into are attorney-client communication.  
25 Those cases say that attorney-client communications with the

1 plan fiduciaries are not privileged because the true  
2 relationship is with the beneficiaries, not the plan  
3 fiduciaries.

4 So all this advice and all this process -- and  
5 you have to understand the Groom firm creates the plan, they  
6 advise the Committee, they advise the Board, they advise the  
7 Plan office, they advise the NFL Players Association, they make  
8 changes to the plan. They provide advice on Committee and  
9 Board decisions and they litigate the cases. Inherent conflict  
10 which, frankly, we're going to be moving for disqualification  
11 here shortly anyway. But these are the issues that we're  
12 trying to hide the process here.

13 And they've done pretty well at hiding it in  
14 the past, and that's why you see them citing other cases. This  
15 case is not like those others. No one else has known that  
16 these decisions were written by the Groom firm without the  
17 Board actually ever seeing it, without the Committee actually  
18 seeing it, without the Committee approving these decisions,  
19 without the Board approving these decisions.

20 This is a completely new landscape. All their  
21 past case law is off the rails. It's not there because the  
22 facts and circumstances that have been pulled out in these  
23 depositions have explained what this process really is. And  
24 it's alarm and appalling. Never seen anything like this. And  
25 I represent all kinds of organizations and groups in this

1 industry and never seen anything like this.

2 So when -- when you look at the grand scheme of  
3 things and -- and where this is -- and we've cited to you and  
4 provided you excerpts of their testimony. Take a look at it.  
5 You will be alarmed with some of the things that they were  
6 admitting to and agreeing with.

7 So going back to, again, why it is important to  
8 talk to board members. In addition to the fact that, yes, they  
9 are the fiduciaries of the plan, they did decide the  
10 reclassification final decision. But look at what has been  
11 filed by the Defendants themselves -- or what we have -- what  
12 they have responded to in discovery. They say things like the  
13 Retirement Board provided a full and fair review, thus  
14 providing the review by a retirement board the named fiduciary  
15 of The Bert Bell plan that took into account all comments,  
16 documents, and additional information submitted by the  
17 Plaintiff.

18 So they're wanting us to take it as gospel  
19 after learning that the members of the Board didn't actually  
20 see the letter they want us to rely on. But they're pointing  
21 us back to the Groom firm's own letter that they wrote without  
22 approval of the Board.

23 And if you look at a response to request for  
24 production, the Retirement Board is the only body that isn't  
25 material to the case because the Retirement Board's decision on

1 Plaintiff's February 2016 request for reclassification -- it  
2 was them that decided it. So, again, they're saying, no, go to  
3 the Board.

4 We've deposed three people trying to get  
5 information on what the Board did. Committee said we don't  
6 know, you got to go ask the board members. Sam Vincent, the  
7 corporate representative, I don't know what they did. You have  
8 to ask the board members. Well, now they're blocking what all  
9 their witnesses have already told us we need to go do.

10 These are the people who decided the case. Two  
11 of them are lawyers, which is different than the Committee who  
12 has no medical and no legal training whatsoever. Now,  
13 Ms. Smith did testify that she ran across some concussion  
14 studies in her job. But both of those two admit, you know,  
15 they don't have any training. They may get some updates or  
16 refreshers when the plan changes from the Groom firm, but they  
17 don't -- they don't even think it's necessary to have any  
18 knowledge of concussion in their review.

19 It's extremely important we have the  
20 opportunity to talk to these people because they're the ones  
21 that had to provide the full and fair review under ERISA.  
22 They're the ones that couldn't act arbitrarily and  
23 capriciously. They're the ones that can't provide inconsistent  
24 review. Those are the things that we're going to ultimately  
25 have to show you, which I believe we will based on what we've



1 already heard. But the people that made the decision are the  
2 board members. That's why we need them.

3 We cited to you the cases --

4 THE COURT: I don't have the Board decision in front of  
5 me, the actual document. Who signs off on the Board decision?  
6 Do they all sign off or...

7 MR. DENNIE: No one from the Board signed off on it,  
8 Your Honor.

9 THE COURT: There was no signature?

10 MR. DENNIE: No, nobody from the Board. Michael B.  
11 Miller, the plan director, signed it.

12 THE COURT: So there's no chair of the Board or no...

13 MR. DENNIE: No.

14 THE COURT: That you're aware of?

15 MR. DENNIE: No.

16 THE COURT: So I didn't overlook that. It's not there.

17 MR. DENNIE: Yeah. Mr. Miller is another --

18 THE COURT: What is it that you are -- I know that you  
19 told me off the record, before this hearing progressed on the  
20 record, that you exchanged multiple e-mails with the Plan's  
21 counsel, and that was since the motion was filed. At this  
22 point, what is it that you are seeking?

23 MR. DENNIE: As it pertains --

24 THE COURT: I think it's laid out -- is it any  
25 different than what you laid out in the Plaintiff's reply --

1 MR. DENNIE: Sure.

2 THE COURT: -- on the -- hold on. I'll read it to you.

3 In the prayer for relief, that you're seeking  
4 -- tell me if there's anything different -- that you're seeking  
5 the depositions of Katie Blackburn, Dick Cass, Ted Phillips,  
6 Sam McCullum, Jeff Van Note, and Robert Smith to begin such  
7 depositions within five days, and that Defendant be ordered to  
8 produce documents responsive -- we really haven't talked about  
9 that -- Request for Production Numbers 18, 37, 57, 58, and  
10 second Request for Production Number 3, and then you ask for  
11 attorney's fees and expenses and cost.

12 So what -- what is it that you're asking for  
13 today now that you've had --

14 MR. DENNIE: The only --

15 THE COURT: -- exchanges with opposing counsel?

16 MR. DENNIE: And to be clear, Your Honor, we did talk  
17 before as well. They did say they would revisit the board  
18 member --

19 THE COURT: And you represented to the Court that you  
20 were given some documents --

21 MR. DENNIE: Correct.

22 THE COURT: -- today. And you can...

23 MR. DENNIE: Yes. So the only thing that has changed  
24 based on what we've previously submitted is they did submit  
25 12 pages of records, which are pie charts. And this is what

1 we're -- what we're dealing with here.

2 During the deposition, I asked questions about  
3 -- all three of them -- how many claims were filed, how many  
4 were granted, how were any denied, where do we find that  
5 information. The director's report, the counsel's report.  
6 Both Mr. [sic] Smith and Ms. [sic] Reynolds referred to those  
7 two documents. When are they prepared? Quarterly for the  
8 board meeting. So these are things the Board reviews.

9 During Mr. Vincent's deposition when we were  
10 asking questions about certain records and how decisions were  
11 made going towards trying to determine if they were arbitrary  
12 and capricious decision, whether a full and fair review was  
13 granted, whether anything was inconsistently decided, he  
14 brought up, oh, we have a database where we log all of that.

15 And I asked him, Do you have the ability to  
16 make queries?

17 And he said, Yeah, we can run queries for total  
18 and permanent disability. We can determine whether someone  
19 received active football benefits or inactive benefits or  
20 denied. We can run query on that.

21 I said, Well, if you run a query, how far back  
22 can you go?

23 Well, only since the system was created, which  
24 I think was between 2011 and '13.

25 I asked him, Well, how many --

1 THE COURT: Okay. Well, I think you're kind of...

2 MR. DENNIE: I'm trying to...

3 THE COURT: I think you're trying to explain the pie  
4 charts that were given to you as opposed to answering the  
5 Court's question which is, what is it that you want today?

6 MR. DENNIE: Nothing's changed.

7 THE COURT: Okay.

8 MR. DENNIE: Other than we got these 12 pages. I was  
9 just trying to explain what else is out there that's not in  
10 these 12 pages of pie chart.

11 THE COURT: Okay. So you are still seeking the same  
12 relief that's set forth in the prayer for relief in the reply,  
13 correct?

14 MR. DENNIE: Yes, Your Honor. You brought up -- I  
15 believe we were not on the record at that point, but they have  
16 filed a summary judgment since then. We were hoping to also  
17 address response deadline because we believe this discovery  
18 that we're requesting here, we need this to, one, because we're  
19 entitled to it. But --

20 THE COURT: I'll get to that. What about -- we talked  
21 a lot about the depositions that you want. You want to comment  
22 any further on the request for production documents that you  
23 are seeking?

24 MR. DENNIE: Yeah. The request for production are in  
25 two categories. That's the -- what I was talking about -- the

1 director's report, counsel's report, plan database where you  
2 can run queries, which Mr. Vincent testified there are  
3 hundreds, not thousands, of what they can spit out into an  
4 Excel spreadsheet that shows whether claims were granted,  
5 denied, what benefits were granted and, you know, what time  
6 periods so we can try to make a determination whether there was  
7 an inconsistent review.

8 Counsel's report, director's report, as I  
9 mentioned, are documents that all of their witnesses have  
10 referred to is what I need to see. And they're prepared  
11 quarterly. So it's not like this is a document that's prepared  
12 365 times a day -- I mean, a year. It's a quarterly report  
13 that's presented to the Board at the board meeting.

14 So that's --

15 THE COURT: So you're asking for a quarterly report?

16 MR. DENNIE: Yeah. There's two of them.

17 THE COURT: Okay.

18 MR. DENNIE: Counsel's report and a director's report,  
19 which Ms. Smith said that the counsel's report addresses things  
20 that are not just legal in nature. Again, as I mentioned  
21 before, we still take the position that the advice that they  
22 provide is not privileged. But, you know, those -- those are  
23 the three documents that we are looking for on that side.

24 The medical records. He was -- Mr. Cloud was  
25 sent to three plan doctors. We received for the first time

1 ever documents from Dr. Canizares on July 29, 2021. There are  
2 some outstanding documents to Dr. Mandelbaum -- from  
3 Dr. Mandelbaum, who was another plan physician. They initially  
4 took the position that Mr. Cloud saw him at the direction of a  
5 team after we presented them with a document confirming they  
6 agreed that he is a plan physician. We haven't seen those  
7 documents.

8 We also believe that we should have access to  
9 the medical repository of records that all the witnesses have  
10 testified to. Each of them said they didn't know how to access  
11 it. But Ms. Smith testified she would refer Mr. Cloud to the  
12 Plan to get those records and, frankly, that's what Mr. Cloud's  
13 testimony would be, that he called the players association and  
14 the players association told him to call the Plan office to get  
15 his medical records because he was a retired player. And that  
16 the Plan office told him and his now ex-wife, you know, we'll  
17 get you the records. And that's a part of the issue in this  
18 case as well.

19 The first time in January 2019, Mr. Cloud gets  
20 an e-mail from the Groom -- Groom firm providing 860 pages of  
21 records. If you look at the administrative record, it's 529  
22 pages. Then in this lawsuit, in addition to -- to the  
23 administrative records, the Groom firm presented 1500 pages of  
24 ex file records. So we keep getting different records that  
25 they're saying weren't in the administrative record, but we

1 keep getting new records. Why weren't they in the  
2 administrative records? Nobody can answer that question,  
3 either.

4 So there's a lot of things out there that are  
5 prohibiting us from putting on the full facts in this case.  
6 It's pretty simple though, ultimately. Mr. Cloud's disabled.  
7 He meets the definition of Section 5.7(b). He was not provided  
8 a full and fair review. They're going to try to rely on what  
9 the Board did and say, see, they met the ERISA regulation by  
10 presenting this letter here that we prepared. And we went.  
11 That's the position they're trying to take in this case. So  
12 they're attempting to foreclose our ability to get the  
13 information we need.

14 And I've already deposed three people without  
15 key documents that I should have received, frankly, in response  
16 to initial disclosures. And now I'm trying to get those so I  
17 can depose these board members.

18 THE COURT: Okay. Anything else that's not already in  
19 your papers?

20 MR. DENNIE: Yeah. The only other thing, as I said,  
21 Your Honor -- you may want to take this up later -- is, you  
22 know, we -- if this case is going to be restructured from a  
23 timing standpoint, we would want that --

24 THE COURT: Okay. Let's make sure we do that before  
25 you leave the room today, okay?

1 MR. DENNIE: I just want to make sure that if you're  
2 going to grant us depositions, we get the opportunity to take  
3 those before having to respond to the summary judgment.

4 THE COURT: Thank you.

5 MR. DENNIE: Thank you.

6 THE COURT: We've gone about an hour, but I can keep  
7 going. But we can take a break if either lawyers need it.

8 MR. MEEHAN: Personally, I'm happy to go straight  
9 through as long as Your Honor wants.

10 THE COURT: Okay. Are you okay, Mr. Dennie?

11 MR. DENNIE: I'm fine, Your Honor.

12 THE COURT: Let's keep going. Go ahead.

13 MR. MEEHAN: Your Honor, we --

14 THE COURT: And, remember, we're here on a motion to  
15 compel. Go ahead.

16 MR. MEEHAN: I understand. Your Honor, we do agree on  
17 one thing. I say Plaintiff and Defendant, we do agree on one  
18 thing. And as best I took it, this is my quote from  
19 Plaintiff's counsel that this is, quote, a completely new  
20 landscape, end quote. We absolutely 100 percent agree.

21 What is happening in this case has never  
22 happened before, ever, to our knowledge in any case involving a  
23 review of a benefits decision. What Plaintiff is asking Your  
24 Honor to do, four square, violates blackletter, en banc  
25 opinions of the Fifth Circuit. If Your Honor goes down the



1 path that Plaintiff is asking the Court to go, it is reversible  
2 error. What the Court has already permitted is beyond what the  
3 Fifth Circuit has allowed.

4 We cooperated -- well, I would say, one, we  
5 attempted to persuade Your Honor not to order those  
6 depositions. Your Honor ordered them and so we complied. We  
7 produced the two committee members. We went beyond that in an  
8 effort to try to avoid where we are today, arguments that are  
9 really conclusory in nature, very few specifics about failings  
10 in the process.

11 When we received a notice for a  
12 51-topic 30(b)(6) deposition, we engaged in communications  
13 designed to clarify what Plaintiff wanted. We did not come to  
14 Your Honor to block that deposition. We had hoped that by  
15 participating in that deposition that we would be addressing  
16 Plaintiff's concerns to the best of our ability and to be able  
17 to come back on a record and show to Your Honor that we have  
18 attempted to cooperate.

19 What -- what Your Honor's hearing is an awful  
20 lot of adjectives, an awful lot of conclusory statements. The  
21 facts here are that there are over 1200 -- I think close to  
22 1300 pages of deposition transcripts from three witnesses. It  
23 is remarkable that these depositions each generated on or about  
24 in excess of 400 pages.

25 We -- and I -- and I handle -- I don't know if

1 the Court's aware, I handled, I defended each of those  
2 depositions. And although there were some colloquy, I tried to  
3 be off the record as much as possible. Not a single question  
4 did I instruct any witness not to answer.

5 I did note at the outset of the first  
6 deposition, Mr. Reynolds' deposition, that Your Honor had  
7 entered the -- the order in July 22nd, Docket 38, which  
8 identified three and only three areas of discovery, and I  
9 asserted a standing objection to going outside those three  
10 areas. Not -- respectfully, Your Honor, not conceding that  
11 those three areas were proper, but we had a court order in  
12 front of us and we had no choice but to comply with it at that  
13 point as we thought in an effort to try to resolve things in a  
14 cooperative way. And Plaintiff's counsel made quite clear he  
15 was not restricting himself to Your Honor's Document 38,  
16 July 22nd, '21, order. He was going to ask anything he wanted.  
17 And he did.

18 If the Court reviews those transcripts, the  
19 breadth of the topics. And, yes, references to Mr. Webster and  
20 suicide notes and how does it make you feel to deny someone's  
21 claim and an outburst from Mr. Cloud off the record which was  
22 then brought on to the record in part. These were highly  
23 theatrical, highly emotional and completely new landscape  
24 discovery.

25 Because the answer to -- to why we're here is

1 on Page 15 in Plaintiff's reply on the motion to compel. And  
2 -- and I can read it. There's just a sentence in there I  
3 wanted to bring out.

4 THE COURT: I got it in front of me. Go ahead.

5 MR. MEEHAN: Okay. Page 15, Paragraph Number 9, third  
6 sentence.

7 THE COURT: Well, my Page 15 is different than yours.  
8 So go ahead and read it to me.

9 MR. MEEHAN: All right. Sorry. Yeah. So typed  
10 Page 15 in the reply. Third sentence reads: "Cloud is  
11 permitted to obtain discovery regarding any nonprivileged  
12 matter that is relevant to any parties [sic] claim or  
13 defense..."

14 There was a typo there on parties, but that's  
15 what we all know was -- was meant to say.

16 That's wrong. That's wrong. Blackletter law,  
17 Fifth Circuit. That's wrong. That is pertaining to a -- a  
18 more general tort case or something else where discovery is  
19 very broad in the Fifth Circuit. And counsel cited the *Vega*  
20 and *Crosby* cases. Yes, those are excellent cases to read.  
21 *Vega* and *Crosby* say that this sentence I just quoted is wrong.  
22 And when I say "wrong," what I mean is that's a general rule of  
23 discovery. It doesn't apply here.

24 Where we are, this Court is sitting, in  
25 essence, as a court of review, almost as if this were a court

1 of appeals. And the focus of the case is on the administrative  
2 record. What is inside the administrative record is what the  
3 Court reviews to determine did the decisionmaker here have a  
4 rational basis for the conclusion that was reached?

5 *Vega* and *Crosby* are crystal clear that you  
6 don't go outside of that. And *Crosby* -- and this is at 647  
7 F.2d -- I'm sorry, F.3d 258 and the jump cite comes to 261 --  
8 makes it clear that -- and this is a quote. "Although a court  
9 is afforded broad discretion when deciding discovery matters,  
10 the court abuses its discretion when its decision is based on  
11 an erroneous view of the law."

12 And, Your Honor, I'm saying this, I mean, this  
13 with great respect to all. This is the path the Court is being  
14 led down to, is to make a decision on discovery based on an  
15 erroneous view of the law. In the Fifth Circuit, as *Crosby*  
16 says at Page 262, continuing to 263, is that the precedent in  
17 the Fifth Circuit -- and they're referring to *Vega*, which I'll  
18 quote in a moment. "With respect to material factual  
19 determinations -- those that resolve factual controversies  
20 related to the merits of the claim" -- which is what this is  
21 all about, supposedly that the wrong classification was put in  
22 place and a different approach and a different conclusion to  
23 the breach. That's an argument on the merits.

24 The Court may not consider evidence that was  
25 not part of the administrative record with very few exceptions.

1 That comes, then, back from the *Vega* case which was the en banc  
2 decision where this whole issue of what discovery is allowed in  
3 this type of administrative review case. And *Vega* was crystal  
4 clear.

5 Let me give you the -- I should give you the  
6 page, cite here for a moment. This is 188 F.3d 287 is where it  
7 starts. And if we jump over to 298.

8 "We hold today that the administrative record  
9 consists of relevant information made available to the  
10 administrator" -- that's the plan here -- "prior to the  
11 complainant's filing of a lawsuit and in a manner that gives  
12 the administrator a fair opportunity to consider it."

13 That's why I was trying to take such pains --

14 THE COURT: What are the exceptions?

15 MR. MEEHAN: There are. If -- and I'll do this from  
16 memory without grabbing the quote. Interpretation of a plan  
17 term.

18 THE COURT: Well, that's been brought up today. Okay.  
19 Keep going. Next exception?

20 MR. MEEHAN: Well, I would suggest we -- we should  
21 focus on whether any discovery goes to that issue because it  
22 does not.

23 THE COURT: Okay. But keep going on the exceptions.

24 MR. MEEHAN: If -- if the Court requires expert medical  
25 testimony to understand terminology.

1 THE COURT: Right. Okay.

2 MR. MEEHAN: The Court has already rejected that in the  
3 past. And then if -- there are a few exceptions. There are  
4 also issues where a plaintiff can contest whether the  
5 complete -- administrative record is complete.

6 THE COURT: And I think that's being done here. Okay.

7 MR. MEEHAN: Your Honor allowed discovery on that  
8 point. We would suggest to the Court that discovery is not --

9 THE COURT: So there's two potential --

10 MR. MEEHAN: -- permitted on that --

11 THE COURT: Are there at least two potential exceptions  
12 to the general rule that you're citing, which the Court is  
13 aware of, in *Vega* and others that at least -- and I agree with  
14 you that there's been a lot of conclusory statements made by  
15 your opposition, okay? I'm in agreement with that. But there  
16 are some kernels in there that -- including the couple of  
17 exceptions that you threw out. I don't think you cited all the  
18 exceptions, but they were the two that I was looking at.

19 MR. MEEHAN: Well, Your Honor --

20 THE COURT: And so you're saying that the two people on  
21 the committee level didn't know anything about -- well, I  
22 haven't read the whole deposition. So you -- and you haven't  
23 really been able to do a sur-reply to the reply. But it seems  
24 like they're saying they didn't look at anything, they weren't  
25 given this and that, you know. At least the Plaintiff's

1 counsel is arguing at least two of the exceptions apply.

2 Are there any other exceptions?

3 MR. MEEHAN: Well, it -- there are no other exceptions  
4 that would apply. And, Your Honor, we don't agree those do.

5 THE COURT: Okay. Any other exceptions that -- I'm not  
6 asking whether you agree that they apply 'cause I know what  
7 your position on any exception applying. But any exceptions?

8 MR. MEEHAN: There are -- there are exceptions, Your  
9 Honor. It is our review --

10 THE COURT: Can you tell me what they are?

11 MR. MEEHAN: There had been suggestions that issues  
12 about compliance with ERISA procedures can be looked into.

13 THE COURT: Okay.

14 MR. MEEHAN: And that's all that I can recall at the  
15 moment --

16 THE COURT: Okay.

17 MR. MEEHAN: -- Your Honor.

18 THE COURT: Continue. Thank you.

19 MR. MEEHAN: Just very briefly, Your Honor.

20 THE COURT: And I think the third exception that you  
21 just threw out is another one that, at least the Plaintiff's  
22 counsel is alleging, may be worthy of discovery, but okay.

23 MR. MEEHAN: Your Honor -- Your Honor --

24 THE COURT: I'm not saying I agree with him. I'm just  
25 identifying the issues that you're saying as a general rule no

1 but there's some exceptions, and you threw out some exceptions  
2 off the top of your head. I've got them written down up here.  
3 And three of them that I can identify, there's allegations that  
4 they may be applicable in this case. But you continue.

5 MR. MEEHAN: There are conclusory assertions. And the  
6 point there, Your Honor, is I would urge the Court to require  
7 Plaintiff to be specific. If we're pursuing a failing of an  
8 ERISA requirement, can we specify it? Because our efforts off  
9 the record, on the record interchanges with counsel have been  
10 completely unsuccessful in having Plaintiff identify a single  
11 shortcoming under ERISA or -- or the applicable regulations.

12 So for example -- and I'll come back to the  
13 point that I was going to make here in just a moment, but to  
14 follow this. For example, to say that no board member is a  
15 doctor, we concede it. No need for discovery. But that's not  
16 an ERISA violation. No committee member is a doctor, concede  
17 it.

18 THE COURT: Is it an issue in your eyes if committee  
19 members or board members, we don't know, never see the decision  
20 or a copy of their decision before they sign off on it or even  
21 know or understand what definitions are to be applied or what  
22 they mean? Is that...

23 MR. MEEHAN: Your Honor, that's a hypothetical  
24 question.

25 THE COURT: No. That was read to me from deposition



1 testimony, or excerpted.

2 MR. MEEHAN: That's not what the deposition say.

3 THE COURT: What did the deponents say? Did any of the  
4 deponents say that they read or saw their decision before they  
5 signed off on it?

6 MR. MEEHAN: Neither of the committee members testified  
7 that they -- that they read the decision letter before it went  
8 out. That part is correct.

9 THE COURT: What about they even saw a copy or had  
10 input into it?

11 MR. MEEHAN: They both testified that the decision  
12 letter reflected their decision. They did not choose the words  
13 they made the decision. And there are --

14 THE COURT: Did they make the decision before the  
15 decision was memorialized?

16 MR. MEEHAN: Yes.

17 THE COURT: Was there testimony to that effect?

18 MR. MEEHAN: Yes. And they testified they did. These  
19 committee members made the decision at that level and then  
20 it -- and then the decision was put in letter form, according  
21 to the witnesses, by an employee of the plan benefits office.

22 THE COURT: Did --

23 MR. MEEHAN: Following standard practice.

24 THE COURT: Did the -- did one of the deponents admit  
25 that Mr. Cloud meets the definition of changed circumstances.

1 MR. MEEHAN: No. Ms. Smith, after being asked a long  
2 series of hypothetical questions, which do not accurately state  
3 the facts concerning Mr. Cloud, answered in the hypothetical.

4 THE COURT: Okay.

5 MR. MEEHAN: To the effect of, okay, everything you're  
6 saying, counsel -- and these are not her words. This is my  
7 translation. If everything you're saying is true, that may.  
8 That may. It was a hypothetical. And then she went on to add  
9 why the claim was denied notwithstanding all of those  
10 assumptions.

11 THE COURT: Okay.

12 MR. MEEHAN: This is what I'm getting at. The  
13 conclusions being argued from these transcripts cannot -- and,  
14 Your Honor, please don't -- please don't just take my  
15 conclusions, either. I am giving them in good faith, and I --  
16 I have to trust that counsel for Plaintiff is doing the same.  
17 But rather than rely upon our interpretations or our memories,  
18 the transcript themselves need to be looked at.

19 Ms. Smith did not admit that, and she -- none  
20 of the witnesses -- wait. I'm sorry. 'Cause I may be  
21 interrupting Your Honor. I was going to go to the other  
22 points, if that's okay.

23 THE COURT: Well, is there a definition of changed  
24 circumstances or clear and convincing evidence?

25 MR. MEEHAN: Changed circumstances is defined in at

1       least two -- two cases.

2               THE COURT: No. I meant in the plan.

3               MR. MEEHAN: At that time in the plan, I believe there  
4       was no specific definition. It was left to...

5               THE COURT: Whatever they felt like?

6               MR. MEEHAN: No, not at all, Your Honor. What it was  
7       left to was many years of practice and the -- the ordinary  
8       definitions of those terms. What the witnesses all testified  
9       to is they had an understanding of what it meant.

10              THE COURT: Okay. But bottom line is there was no  
11       definition, right?

12              MR. MEEHAN: No, I would not agree with that, Your  
13       Honor. The bottom line was --

14              THE COURT: In the plan, it was not defined?

15              MR. MEEHAN: There is -- there is no defined term in  
16       the plan but there were 15, 16, 17 years of practice --

17              THE COURT: I understand.

18              MR. MEEHAN: -- which is another way to define the  
19       term.

20              THE COURT: I'm going to be the decisionmaker on the  
21       case, and I'm looking for specific information. I'm not trying  
22       to play devil's advocate. Okay? So I know how you're going to  
23       say, but that's not relevant or but, you know, we have years of  
24       practice. But I just want to make sure --

25              MR. MEEHAN: Well, Your Honor --

1 THE COURT: -- that there is no definition in the plan  
2 of clear and convincing evidence or changed circumstances.

3 MR. MEEHAN: At that time there was not. And, Your  
4 Honor, what I'm --

5 THE COURT: Is there now?

6 MR. MEEHAN: Pardon me?

7 THE COURT: Is there now? You keep saying "at that  
8 time." That implies that there is a definition now.

9 MR. MEEHAN: I believe there has been one. But --

10 THE COURT: On both those terms?

11 MR. MEEHAN: At this time -- at this time in question  
12 there was not in the plan.

13 THE COURT: Okay. So at one point -- let's take each  
14 term by itself. There was a -- there was no definition of  
15 changed circumstance in the plan?

16 MR. MEEHAN: As a defined term in the plan, no.

17 THE COURT: There is now a definition of changed  
18 circumstance in the plan?

19 MR. MEEHAN: I would have to look to determine that,  
20 Your Honor.

21 THE COURT: I thought you just told me.

22 MR. MEEHAN: I'm speaking only to the time when  
23 Mr. Cloud's decision was made.

24 THE COURT: Okay. I thought you just represented to  
25 the Court 'cause you keep being very careful, as lawyers need

1 to be, that at the time of Mr. Cloud's hearing, whatever you  
2 call, review, there was no definition. But you keep saying "at  
3 that time," and what that implies to the Court is subsequent to  
4 it there was a definition. Do you know if there was a --  
5 there's a definition subsequent to -- "at the time" I guess  
6 would be 2016?

7 MR. MEEHAN: Right. 2014 through 2016 -- well, 2016 in  
8 this case, yes.

9 THE COURT: Right. So is there a definition since  
10 2016? That's only five years ago.

11 MR. MEEHAN: I can't -- I can't say that. I believe  
12 the Plan follows the definitions that are memorialized in the  
13 two Maryland cases that are cited in our papers.

14 THE COURT: Okay. So you don't know if that's -- it's  
15 in there right now?

16 MR. MEEHAN: I do not.

17 THE COURT: Okay. Or any definition? You just think  
18 it might be?

19 MR. MEEHAN: No. I'm stating nothing on that point,  
20 Your Honor.

21 THE COURT: Okay. What about clear and convincing  
22 evidence? At the time, 2016, there was no definition of that?

23 MR. MEEHAN: It was not a defined term beyond -- beyond  
24 the normal usage.

25 THE COURT: No. A defined in the term. I mean, I

1 can -- I just might -- is that something that's been produced  
2 in this case, the actual plan? 'Cause I can go look it up.

3 MR. MEEHAN: Yes.

4 THE COURT: 'Cause I think it will be faster for me to  
5 look it up than get a straight answer from you.

6 MR. MEEHAN: Your Honor, I'm sorry. I don't mean to  
7 quibble, and I don't know why the Court would think I'm not  
8 giving you a straight answer.

9 THE COURT: I am asking for what is defined in writing  
10 in the plan. Is changed circumstance in writing in the plan in  
11 2016; you said no. Is clear and convincing evidence as defined  
12 in the plan in black and white in 2016; you said no. But now  
13 you're saying, oh no, maybe.

14 MR. MEEHAN: No.

15 THE COURT: Neither of those were defined in the plan?

16 MR. MEEHAN: In 2016 neither of those terms --

17 THE COURT: Okay.

18 MR. MEEHAN: -- were defined in the plan.

19 THE COURT: Let's start with clear and convincing  
20 evidence. Has that term since been changed in the plan?

21 MR. MEEHAN: I don't know.

22 THE COURT: And same thing with changed circumstances.

23 MR. MEEHAN: As defined in the plan, I don't know.

24 THE COURT: Okay.

25 MR. MEEHAN: Your Honor --

1 THE COURT: You can continue.

2 MR. MEEHAN: Your Honor, again, testimony, it was  
3 described that all of the witnesses acknowledged that there was  
4 a repository. Each of the witnesses acknowledged that under  
5 the 2011 collective bargaining agreement, that there was to be  
6 created a medical repository. Each of the witnesses -- and  
7 again, my memory, you'll check the transcripts -- indicated  
8 that they did not know the extent to which such a repository  
9 had been fully implemented.

10 Mr. Vincent, who had the most knowledge on the  
11 topic, indicated that the repository was in process of being  
12 created, had limits, not necessarily all teams were subscribing  
13 to it. And that his understanding, no team created a  
14 repository for medical information for any player who was no  
15 longer active. And that as of the time the repository was  
16 being created, there would be historical data but only for  
17 active players. So there is -- based on that information,  
18 there is no reason to suggest that -- that there is anything in  
19 this repository that relates to Mr. Cloud because he went  
20 inactive after the 2005 season.

21 THE COURT: Did the Plan look for any information in  
22 the repository for Mr. Cloud?

23 MR. MEEHAN: No. The Plan has no access to it.

24 THE COURT: Who has access to it?

25 MR. MEEHAN: It's -- it's being -- it's run by the

1 League. It is not the Plan's repository.

2 THE COURT: The Plan has no access to it whatsoever,  
3 even -- you can't -- you never requested? Nothing? You have  
4 no access to it, period? That's what you're representing on  
5 the record?

6 MR. MEEHAN: That is my understanding, based on the  
7 depositions and the discussions that occurred.

8 THE COURT: All right. Continue.

9 MR. MEEHAN: Your Honor, the -- the Groom firm did  
10 write the decision in 2016 concerning Mr. Cloud. The Groom  
11 firm as plan counsel, just as corporate counsel would be in any  
12 normal instance, attends the boards meetings. The Board made  
13 its deliberations reflected in the minutes which are, of  
14 course, fairly cursory as minutes typically are.

15 Counsel expanded by providing the appropriate  
16 plan provisions so that all of that would be available for the,  
17 in this case, the applicant to see and gave the appropriate  
18 detail laying out the three reasons why the reclassification  
19 was denied. It's not unusual. And that's what happened. And  
20 everyone agrees on that. There is no violation of ERISA  
21 regulations for plan counsel to write the decision letter after  
22 the Board has made the decision.

23 And the reason I'm citing this is this idea --  
24 Your Honor, it's crystal clear that the Court is very  
25 sympathetic to Mr. Cloud and is troubled by some of the



1       assertions that are being made. But I'm trying to keep us  
2       focused, Your Honor, on the -- the rule of law and not to make  
3       the reversible error --

4               THE COURT: The Court is not sympathetic or  
5       unsympathetic. I would like to get to the bottom of this. I'd  
6       like to know what the full picture is. The Court would like to  
7       know what went into the Committee's decisions and the Board's  
8       decisions.

9               MR. MEEHAN: Your Honor --

10              THE COURT: I -- you know, within the bounds of what is  
11       appropriate. I think there's a light that needs to be shined  
12       on this. And you-all need to tell me -- you know, you guys are  
13       telling me polar opposites, and so I'm going to be asking for  
14       supplemental briefing with the depositions attached.

15              You told me -- you told me that this is  
16       thousands of pages of depositions. I don't intend to go  
17       through every single page, but you certainly can pull that --  
18       those pages that are relevant to what's being argued today. So  
19       I will go look at it.

20              MR. MEEHAN: Thank you, Your Honor.

21              THE COURT: But to imply that the Court's going to make  
22       a decision because of sympathy is just something that I haven't  
23       done and will not do.

24              MR. MEEHAN: But, Your Honor --

25              THE COURT: So...

1 MR. MEEHAN: I'm sorry. I didn't mean to interrupt.

2 THE COURT: And he is a sympathetic -- as anybody with  
3 brain damage would be, but that has nothing to do with my  
4 decision.

5 MR. MEEHAN: And, Your Honor, he was accepted in 2014  
6 as totally and permanently disabled by the Plan and awarded  
7 benefits and that -- that continues today. The issue is not is  
8 he totally and permanently disabled as the plan would define  
9 it, but does he meet the criteria in the plan to move to a  
10 different level. That's all.

11 THE COURT: Understood.

12 MR. MEEHAN: So, Your Honor, this issue -- and I take  
13 it the Court is trying to understand the basis of the decision  
14 that the Board made and to decline -- to move Mr. Cloud to  
15 active football, and that's what -- that's what Plaintiff is  
16 seeking by these depositions.

17 The problem there, from a --

18 THE COURT: You don't think the Plaintiff is just  
19 attempting to find out if the Plaintiff had a reasonable  
20 opportunity whose claim has been denied for full and fair  
21 review?

22 MR. MEEHAN: Well, that's already demonstrated by the  
23 administrator of record, Your Honor. That's the issue here,  
24 is...

25 THE COURT: No. That's what's before the Court, is

1 whether or not the Plaintiff has -- was afforded a reasonable  
2 opportunity, his claim for benefit was denied for a full and  
3 fair review, right?

4 MR. MEEHAN: And the -- and the way the court --

5 THE COURT: By the Board?

6 MR. MEEHAN: And -- correct. And the way the court in  
7 this circuit resolves that question is by reviewing the  
8 administrative record and what opportunity, if any, was  
9 provided to the claimant to present information.

10 The documents in the administrative --

11 THE COURT: Are you aware of the *Dimry* case that was  
12 just decided a couple of weeks ago?

13 MR. MEEHAN: Yes, I am aware of it.

14 THE COURT: Did you argue that?

15 MR. MEEHAN: I argued it at the Ninth Circuit, yes.

16 THE COURT: Okay. And you lost, didn't you?

17 MR. MEEHAN: On -- on a specific ground, yes.

18 THE COURT: The Court -- are you aware of the *Dimry*  
19 case?

20 MR. DENNIE: Yes, Your Honor.

21 THE COURT: Okay. So the plan --

22 MR. MEEHAN: The ground in *Dimry*, Your Honor, was not  
23 related in any way to any issue in front of this Court.

24 THE COURT: Do you think *Dimry* may be relevant to the  
25 Plaintiff's claim which invokes the same procedural provision

1       that the Plan wrongly denied him benefits due in accordance  
2       with the plan documents?

3               MR. MEEHAN: No. Your Honor, in -- in *Dimry*, the Ninth  
4       Circuit concluded that after there had been two remands -- and  
5       at the second remand the Plan presented all of the information  
6       in the record to a physician to review -- that the Ninth  
7       Circuit concluded that before the Board could render its final  
8       decision once that doctor reviewed everything, the Plan should  
9       have given to the -- the claimant in that case an opportunity  
10      to review the doctor's report.

11             The Plan's position was that the doctor  
12      reviewed all of the issues that had been identified by the --  
13      by the claimant, and so with that, in the Plan's view, was an  
14      unnecessary extra step. The Ninth Circuit disagreed, and it  
15      was remanded on that basis.

16             THE COURT: Okay. The Ninth Circuit is clearly not  
17      binding case law to this Court, but I just found it kind of  
18      interesting that this was just decided -- actually, I found  
19      this case, not even my law clerks did, on August 10th. So I  
20      just found that pretty interesting.

21             MR. MEEHAN: It's in the -- it's an opinion not for  
22      publication, Your Honor.

23             THE COURT: Well, but I still found it. Okay? And,  
24      you know, I can look at other circuits and courts for, you  
25      know, persuasion.

1 MR. MEEHAN: Of course. And, Your Honor --

2 THE COURT: It's not binding.

3 MR. MEEHAN: -- what I'm getting at is this issue of  
4 Plaintiff is trying to inquire into the basis of the decision.  
5 What I am saying is the decision rises or falls on the  
6 administrative record. And --

7 THE COURT: Unless one of those exceptions apply,  
8 right?

9 MR. MEEHAN: Well, unless one of those exceptions  
10 apply.

11 THE COURT: Okay.

12 MR. MEEHAN: But that's where the *Borelli* case from the  
13 Eastern District of Texas --

14 THE COURT: Also not binding but tell me about that.

15 MR. MEEHAN: Correct, not binding. 2005 WL 8160870 at  
16 Asterisk 2 is talking about how an individual in that case  
17 whose name was *Borelli*, his "Notice of deposition... states  
18 that he seeks to depose a corporate representative about 'the  
19 basis for the denial of Plaintiff's claim for long-term  
20 disability benefits.' His notice does not indicate that he  
21 seeks to discover evidence, admissible or otherwise, about plan  
22 interpretation, or any other issue on which the Fifth Circuit  
23 has permitted plaintiffs to supplement the administrative  
24 record. Because *Borelli* seeks to depose a corporate  
25 representative about a question which the Court may not

1 consider in determining whether the Plan administrator abused  
2 its discretion, this motion is hereby DENIED."

3 That's what's happening here. The Plaintiff  
4 wants to depose each and every member of the -- of the board on  
5 the basis for their decision. And I know that because that is  
6 a direct quote from the emergency motion, that the -- quote,  
7 the only people who know the basis of the decision to decline  
8 benefits to Cloud, et cetera, are the Board. And that's why he  
9 wants to take the deposition. And, again, all those  
10 accusations about, quote, hiding the ball and shielding Cloud  
11 from the facts of the case. That's at the emergency motion,  
12 Paragraph 28.

13 What the *Borelli* case is pointing out is  
14 consistent with the Fifth Circuit law. It is an error of law  
15 to allow those depositions because they are going to a subject  
16 that is not within one of the exceptions.

17 If we cannot persuade this Court on the  
18 administrative record that we acted rationally, if the Court  
19 looks at that and -- and determines that the Plaintiff has  
20 shown that we acted arbitrarily or capriciously, that's all the  
21 Court needs for a decision. And that's -- Your Honor, I have  
22 to ask because there were some references off the record to the  
23 effect that the Court is contemplating holding a trial here.  
24 There is no trial in this case. It is summary judgment, up or  
25 down.

1 THE COURT: I know that's what your position is. And  
2 my references were when I was talking to you about was a  
3 scheduling order that was moving the trial date and all the  
4 deadlines to it. So, yes, you made it very clear from your  
5 very first pleading that you think you should win based on a  
6 dispositive motion, and I disagreed with you so far. But I  
7 have not reached the merits of the summary judgment motion yet,  
8 okay? We're here on a discovery issue. You may very well have  
9 a trial if you don't make it past this summary judgment. I  
10 mean, if you -- if the summary judgment is denied. I don't  
11 know. I haven't looked at the merits of that yet.

12 MR. MEEHAN: Your Honor, that's -- that's --

13 THE COURT: So...

14 MR. MEEHAN: -- that's the area --

15 THE COURT: But I'll be focusing on these exceptions.

16 MR. MEEHAN: Okay.

17 THE COURT: So what else do you have to say that's not  
18 in -- in your pleadings?

19 MR. MEEHAN: Okay.

20 THE COURT: Because I probably won't be making a  
21 decision today 'cause I've got more reading to do.

22 MR. MEEHAN: Thank you, Your Honor. Just a few more  
23 items, if I may.

24 THE COURT: Go ahead.

25 MR. MEEHAN: Thank you. And I appreciate the Court's

1 indulgence.

2 THE COURT: It's not my indulgence. I'm very  
3 interested in this, and I really want to hear what you have to  
4 say.

5 MR. MEEHAN: Thank you, Your Honor. It is an  
6 interesting area.

7 THE COURT: Especially if both of you are agreeing that  
8 this is uncharted waters. I wish I didn't have a mask on. I'm  
9 smiling right here, so...

10 MR. MEEHAN: Well, I understand that.

11 THE COURT: Let's continue.

12 MR. MEEHAN: I know the Court understands. We agree  
13 it's, as you put it, uncharted waters or -- or completely new  
14 landscape, as Plaintiff's counsel put it, but for different  
15 reasons.

16 So the point here is discovery must fit within  
17 an exception because, as *Vega* said on the same page I was  
18 quoting earlier, "We will not permit the district court or our  
19 own panels to consider evidence introduced to resolve factual  
20 disputes with respect to the merits of the claim when that  
21 evidence was not in the administrative record." Which is why I  
22 say we rise or fall on the administrative record.

23 If the Court looks at the record and concludes  
24 that there's evidence in there that was not adequately  
25 considered by the Board --



1 THE COURT: Or the administrative record was not  
2 complete or whether the Defendant complied with ERISA's  
3 procedural regulations and any of the exceptions. Right, I get  
4 that.

5 MR. MEEHAN: But in that regard, Your Honor, we already  
6 know all that we need to know and so much more without any  
7 further depositions. What we know from the administrative  
8 record is there were repeated opportunities for Mr. Cloud to  
9 present anything and everything he wanted. And I -- I heard  
10 earlier today that efforts were made to obtain the impact study  
11 from the Patriots. I have not seen a subpoena. This case has  
12 been around for -- since May of '20, if I recall correctly. I  
13 haven't seen a subpoena.

14 THE COURT: Has the Plan or anyone on its behalf or the  
15 Committee ever requested documents from the repository? You  
16 said that you --

17 MR. MEEHAN: In this case, or ever?

18 THE COURT: Ever.

19 MR. MEEHAN: To my -- in this case, no. And to my  
20 knowledge, no in any case.

21 THE COURT: Can you make that request? Can you make  
22 that request in -- with respect to Mr. Cloud from the  
23 repository?

24 MR. MEEHAN: Is Your Honor ordering us to do that?

25 THE COURT: No. I'm just asking the question.

1 MR. MEEHAN: We have not made that request, and we have  
2 no plans to do so.

3 THE COURT: Okay.

4 MR. MEEHAN: And the Fifth Circuit again in *Vega* is  
5 clear. We have no duty to -- to reach out, to identify  
6 information from third-parties or to conduct --

7 THE COURT: What do you do in a situation where you got  
8 a brain damaged, or very damaged -- physically damaged player  
9 who is convinced, rightly or wrongly, that there's medical  
10 records out there, who has repeatedly asked -- I'm just  
11 assuming this is all true. I understand it may not be.  
12 okay? -- who has asked everybody possible to give him the  
13 medical records, franchises, the doctors, whatever? I mean, he  
14 hadn't gotten them. And then he's not allowed to have that be  
15 considered because he can't get it before the Plan, Committee,  
16 or Board.

17 MR. MEEHAN: What --

18 THE COURT: What happens in a situation like that?  
19 Just everybody shrugs their shoulders and say, well, he didn't  
20 get it? We can't get it 'cause we're not going to ask the  
21 repository. We're not going to ask -- I think there was a  
22 document that one of your -- is it Mr. Junk?

23 MR. MEEHAN: Yes, Michael Junk.

24 THE COURT: That he filed that says, you know, what are  
25 we? We're not -- they might have something in the franchises,

1 but that's not us.

2 So what is a player to do if there's medical  
3 records directly on point? I'm not saying in this case that  
4 there is 'cause you -- that's -- that's a disputed item right  
5 now, according to you. One side is saying -- the Plaintiff is  
6 saying that there's at least the impact exam from 2005 that  
7 he's been trying to get that still can't get, and you got  
8 serious doubt whether it even exist. That's what you told the  
9 Court.

10 MR. MEEHAN: May I explain why?

11 THE COURT: No. I'm getting to a question here. So  
12 what's a player to do in a situation like that?

13 MR. MEEHAN: Well, if Your Honor can forgive me,  
14 then -- I'm reluctant to advise someone else who's not my  
15 client, but I will say in the abstract.

16 THE COURT: In the abstract.

17 MR. MEEHAN: Okay. Efforts were made, was what we  
18 heard today, to get it from the Patriots. Rule 45, Federal  
19 Rules of Civil Procedure has a mechanism to issue a subpoena in  
20 a lawsuit that exist. We have not seen a subpoena.

21 THE COURT: Oh, you mean in this case?

22 MR. MEEHAN: In this case.

23 THE COURT: But I'm talking about -- my question -- I'm  
24 sorry. I was talking about before the Committee or the Board.

25 MR. MEEHAN: What -- what the Committee, the Board, the

1 Plan overall does is to implement the terms of the plan. So --  
2 so there are ways to advise players that if they believe there  
3 are team records -- I believe each of the witnesses testified  
4 to this effect -- that they can go to the head trainer of their  
5 last team who should have whatever records are available. So  
6 in this instance, Mr. Cloud could have gone to the Giants.

7 THE COURT: But the Plan makes no -- I know you said  
8 that they have no duty, but the Plan has not made -- cannot and  
9 does not make any effort to facilitate that?

10 MR. MEEHAN: Getting the --

11 THE COURT: Getting it from franchises?

12 MR. MEEHAN: Correct.

13 THE COURT: Okay.

14 MR. MEEHAN: Because if the Plan does that for one  
15 individual and not for the next individual, the second  
16 individual that claim that he or she was somehow treated  
17 differently, and so that --

18 THE COURT: Which is why I'm asking if you've ever done  
19 that before, and your answer is no, right?

20 MR. MEEHAN: My answer is no. I believe it's never  
21 been done.

22 THE COURT: Okay.

23 MR. MEEHAN: But that's my understanding.

24 And so, Your Honor, director reports and  
25 counsel reports, speak briefly about those. The director

1 reports, each of the witnesses refer to them when they were  
2 asked questions along the lines of how many players are in this  
3 category of active football, how many players are in the  
4 category of inactive A, which is where Mr. Cloud currently is.  
5 So both are totally and permanently disabled, but the -- the  
6 levels of compensation are different and the criteria for each  
7 are different.

8 The witnesses through the 30(b)(6) where I,  
9 among others, educated Mr. Vincent over the space of many, many  
10 hours in multiple days about facts so that he could be able to  
11 testify. And, yes, we put together a -- a thick notebook with  
12 everything that we thought would be useful to him to provide  
13 all of that information. And we gave a copy to counsel so he'd  
14 have all of that which --

15 THE COURT: I don't have a problem with that.

16 MR. MEEHAN: Okay. Thank you, Your Honor. 'Cause we  
17 did that to try to make sure he was fully informed as best we  
18 could.

19 But the director's reports came up because when  
20 they were asked about, well, how many claims do you get and how  
21 many are approved, how many are denied, questions to that  
22 nature, the witnesses were, obviously, not able to off the top  
23 of their heads. We prepped them only for the current period  
24 'cause there were topics in the -- in the 51 in the 30(b)(6)  
25 that talk about the present tense. How many are in this

1 category, how many are in that category. But then when the  
2 questions became historical, what about 2016, what about 2012,  
3 things of that nature, the witnesses says, of course, I don't  
4 know because we didn't prep them on that.

5 So they mention director reports have those  
6 statistics. What we did today is we excerpted those pages from  
7 the director's reports going back to 2014, which is when the  
8 initial application here was -- was submitted, and we provided  
9 those to counsel. So they come from the director's reports.  
10 All those statistics are there.

11 The counsel reports do not contain statistics.  
12 The witnesses explained that in addition to director reports,  
13 there are counsel reports. Those go to matters in litigation,  
14 by and large, and the fiduciary exceptions does not apply  
15 there. The firm is providing legal advice on matters in  
16 litigation, by and large. Those counsel reports, we believe,  
17 are privileged and do not speak to the statistical issues that  
18 the Plaintiff was asking about, so we don't think they are  
19 relevant just because the witness mention that this is one of  
20 the ways in which the law firm provides advice to the Committee  
21 or the Board.

22 The queries of the database -- there is a  
23 database which Mr. Vincent spoke about. And he was a little  
24 unclear on exactly how long it had been in existence and how  
25 broad the information. Queries of sorts can be run. So if you

1 want to -- if you want to say, well, I want to know how many  
2 claims there were in a particular year and how many were, you  
3 know, denied or -- or approved, you can get a computer to  
4 generate some numbers. But as I believe Mr. Vincent explained,  
5 a human being needs to go through all of those and figure out,  
6 well, were they total and permanent? Which -- which  
7 classification? Are any of them inactive A or active football?  
8 Which are the two at issue here. And so I believe Mr. Vincent  
9 made clear that this was a multiday exercise.

10 It's never been made clear to us how any of  
11 that information could possibly be of value. So we are  
12 concerned about doing, basically, a search for a needle in a  
13 haystack. If the issue is very broadly put, well, somehow Mr.  
14 Cloud was discriminated against, well, Your Honor will see in  
15 some of the e-mail traffic, which is a bit of the iceberg  
16 between us, where I was only saying, well, the only thing I  
17 heard --

18 THE COURT: I don't have the e-mail traffic, right?

19 MR. MEEHAN: Yes. Some e-mail traffic is attached to  
20 our appendix to our opposition.

21 THE COURT: Some of it. I know that you have continued  
22 to work with each other, which is a good thing.

23 MR. MEEHAN: Right. We have tried.

24 THE COURT: All right. Continue.

25 MR. MEEHAN: So, Your Honor, what -- what I'm getting

1 at is in that e-mail traffic, which is attached to the  
2 opposition, you'll see I raised the point that in the  
3 depositions the only issue at one point where I thought counsel  
4 was suggesting there were some discrimination was he was asking  
5 witnesses questions, do you know Mr. Cloud's ethnicity. And so  
6 I -- I asked him. I said, Well, are you suggesting there were  
7 some sort of racial discrimination? Is that what you're  
8 suggesting?

9 And I didn't get a clear answer, but I surmised  
10 that that was not it. And all the conversations we had went  
11 more to, well, it's arbitrary and capricious. But what does  
12 that mean here.

13 There are approximately, as I understand it, a  
14 thousand claims every year now, and the Board reviews hundreds  
15 of these claims every year. So are we to now go back over 5,  
16 6, 10, 12 years and pull every claim and determine was it  
17 approved, was it denied and -- and do what? Synthesize those  
18 or produce thousands of pages of medical records, extracting  
19 all the names and saying -

20 THE COURT: Well --

21 MR. MEEHAN: What I'm getting at is, where does this  
22 go?

23 THE COURT: Just to -- just to save time. The Court is  
24 not inclined -- I am focusing on this Plaintiff in this case.  
25 And I think there was discussion in the papers about -- I think



1 it was in the context of arbitrary and capricious and, you  
2 know, being able to do discovery to see if there should be a  
3 motion for leave to amend pleadings. And at this time I'm not  
4 really sympathetic to that argument. I'm using the word  
5 "sympathetic" in quotes there. That sounds like beyond where  
6 discovery should go.

7 So if you want to quit while you're ahead on  
8 that, you need to move on.

9 MR. MEEHAN: Thank you for your guidance, Your Honor.  
10 Yes, on that particular point.

11 The reference to medical records that may be  
12 outstanding, the Plan has none. Dr. Canizares, the issue  
13 with -- with him -- and, again, Mr. Vincent testified about  
14 this, is...

15 THE COURT: As an officer of the Court --

16 MR. MEEHAN: Yes.

17 THE COURT: -- you're stating right now the Plan has no  
18 medical records that you haven't already produced in connection  
19 with this litigation on Michael Cloud to the Plaintiff's  
20 lawyer, period?

21 MR. MEEHAN: Correct. Period.

22 THE COURT: Okay. And that the Plan has no documents  
23 that it can access or have a superior right of control on  
24 Michael Cloud?

25 MR. MEEHAN: Yes.

1 THE COURT: Okay.

2 MR. MEEHAN: Including, but not limited to, this  
3 medical repository or any impact study that the Patriots did.

4 THE COURT: All right. So you are representing in  
5 court today you absolutely have given over every single medical  
6 record that the Plan has or can access with respect to Michael  
7 Cloud?

8 MR. MEEHAN: I have been so assured repeatedly. Yes,  
9 Your Honor.

10 THE COURT: Okay. That's what I need to know.

11 MR. MEEHAN: Yes. Briefly --

12 THE COURT: And --

13 MR. MEEHAN: Sorry.

14 THE COURT: Let me ask you to finalize that topic. Has  
15 there ever been -- you're an officer of the court and I take  
16 your word for it, period. But you also said, I've been  
17 repeatedly assured of that. Will you check into whether or not  
18 you can file an affidavit by somebody whose job it was to look  
19 for that and say we have looked for any and all medical records  
20 in our possession, custody, or control? You can look at the  
21 rules of what's required. And I think that means also any kind  
22 of right to compel. You put that in an affidavit and file it  
23 as a supplement to your response, which you have leave to do  
24 right now --

25 MR. MEEHAN: Yes, Your Honor.

1 THE COURT: -- to the motion to compel. I think  
2 that'll put an end to one line of questions and inquiry and  
3 something I was curious about.

4 MR. MEEHAN: Yes, Your Honor. I will --

5 THE COURT: I know you can look into it and you can't  
6 make the representation, but the Court would find that very  
7 helpful.

8 MR. MEEHAN: And, Your Honor, thank you for that  
9 opportunity. I'd be happy to do it. I would just note  
10 briefly, Document 36, which was filed July 20 of '21, is a  
11 declaration of Mr. Vincent which I believe goes to those  
12 points, but I'll look at it with more care to see if there's  
13 anything that we --

14 THE COURT: Was that before or after the deposition?

15 MR. MEEHAN: Before the deposition.

16 THE COURT: Okay. I think it's a very cloudy area  
17 right now. So an affidavit or something -- or the person whose  
18 job it was to look for it, signing off on it, I think that  
19 would be helpful.

20 MR. MEEHAN: Yes, Your Honor. We -- we will --

21 THE COURT: Okay.

22 MR. MEEHAN: -- be happy to do it. Your Honor, from  
23 a --

24 THE COURT: Continue.

25 MR. MEEHAN: I suspect we'll get to time periods for

1 followup papers, so I'll leave that for the moment to decide.

2 THE COURT: Yes.

3 MR. MEEHAN: The impact study. If I may, this is --  
4 this is one of the reasons why I think it's very, very  
5 important.

6 THE COURT: You talk about the impact exam?

7 MR. MEEHAN: Oh. Impact exam. I guess sometimes it's  
8 referred to as impact study, but impact exam.

9 THE COURT: You're talking about the one involving  
10 Michael Cloud in 2005 by the Patriots, if it exists, right?  
11 Okay.

12 MR. MEEHAN: Yes. Allegedly so.

13 THE COURT: Okay.

14 MR. MEEHAN: So -- and I only say that, you know, with  
15 care. I'm not saying it didn't happen. I'm just saying we --  
16 we are not conceding it did and --

17 THE COURT: I understand.

18 MR. MEEHAN: Okay. So the -- it's an example of why  
19 it's so important to be specific rather than, you know, be  
20 appalling and horrible and other such adjectives and to focus  
21 very specifically on what's going on here, is from the player  
22 records that are in the administrative record already. If you  
23 look at the administrative record, you will see that the  
24 complaint is wrong when it says Mr. Cloud played for the  
25 Patriots in 2005 for three weeks. He played for them for six

1 weeks. Why is that important? Here's why.

2 He was with the Giants through the end of the  
3 2004 season. He went to the Giants -- back to the Giants  
4 May of 2005 when spring games began. Cut by the Giants,  
5 September 4, 2005. Picked up by the Patriots, November 4,  
6 2005.

7 And -- and I don't mean to belabor this, but  
8 this really goes to the heart of the discovery issues, which is  
9 November 4, 2005, is already 12 months after the 10-31-04  
10 collision which is the basis of the complaint that supposedly  
11 made Mr. Cloud experience all of his issues. And under the  
12 plan, that shortly after definition, that's crystal clear. If  
13 you're totally and permanently disabled as a result of and it  
14 takes more than 12 months to manifest itself, the Plan cannot,  
15 no matter how sympathetic your situation may be, cannot put you  
16 on active football because it has to happen within 12 months.

17 So Plaintiff says, well, he was only with the  
18 Patriots for three weeks, couldn't remember plays, and they cut  
19 him after they did an impact exam. He stayed with the Patriots  
20 until the 13th of December. He was cut twice. He was cut  
21 after three weeks because they had other players in the depth  
22 chart and they didn't wish to retain him. Two days later, they  
23 brought him back because one of the guys they were counting on  
24 got injured.

25 He stayed and he played through December 13th.

1 That would mean this impact exam had to have been conducted on  
2 the 12th of December. Why do I say that? Because he played in  
3 the game on December 11th. He's cut on December 13th. So if  
4 the impact exam is December 12th and they conclude based on  
5 that it's time to cut him, it doesn't add up. And then he's  
6 later then picked up by the Giants on December 27th, I believe,  
7 and plays on December 31. How that relates again? The shortly  
8 after definition.

9                   Regardless, the Plan does not contest Mr. Cloud  
10 being disabled. The Plan accepted that because he qualified  
11 because the Social Security Administration found him to be  
12 disabled effective December 31, 2008.

13                   So he meets inactive A. But no matter what --  
14 we can argue about changed circumstances, we can argue about  
15 anything. But shortly after is a black-and-white, brick wall  
16 deadline of 12 months. And the complaint says October 31, '04  
17 he was -- the helmet-to-helmet, you heard counsel talk about  
18 it. And immediately thereafter, he's disabled and he couldn't  
19 remember plays.

20                   He plied his trade, was paid by two  
21 professional football teams into the end of 2005. That's more  
22 than 12 months later. And the Committee, when they were  
23 deposed, ultimate -- and this is in the decision letter, same  
24 thing in the Board. They ultimately said in addition to  
25 everything else we have that's of concern, you cannot under any

1 definition meet shortly after.

2 And, Your Honor, there's one other issue that's  
3 going on in this case that is ripe to discuss. Plaintiff is  
4 now, through its amended -- its initial disclosures, and is  
5 arguing an entirely new theory of -- of harm that supposedly  
6 takes place after October 31st of 2004 and is seeking discovery  
7 of all other issues that may relate to this later date. None  
8 of that is in this case.

9 THE COURT: Okay.

10 MR. MEEHAN: So...

11 THE COURT: Anything else?

12 I'll tell you what, we've now gone two hours.  
13 Why don't we all take a ten-minute break. You can both look  
14 over your notes and decide if there's anything else that you  
15 would like to present to the Court by way of oral argument when  
16 we get back. If there -- and please don't be repetitive. And  
17 try not to be. You know, I'm not going to make a decision  
18 today. Okay?

19 And then, also, kind of crystallize in your  
20 mind as to what it is that you would like the opportunity to  
21 brief the Court further, which includes multiple references to  
22 deposition transcripts. It's almost like the two of you were  
23 at two different depositions, or shall we say six different  
24 depositions.

25 So when I come back -- I'll give you an

1 opportunity to take your break. Right now it's 4:33. How  
2 about a quarter to 5:00 we reconvene in here? You take your  
3 breaks down the hall, get, in your mind, what else you want to  
4 argue to the Court that's not already in the papers that you  
5 haven't already argued, and then we'll wrap it up. Okay?

6 MR. MEEHAN: Thank you, Your Honor.

7 THE COURT: Let's take a brief recess.

8 SECURITY OFFICER: All rise.

9 (Court in recess.)

10 THE COURT: Counsel, we're back after our short break.

11 Mr. Meehan, anything further as far as argument  
12 today?

13 MR. MEEHAN: No, Your Honor. Thank you very much.

14 THE COURT: Okay. Anything that you want to say in  
15 reply to the response to argument today?

16 MR. DENNIE: Thank you, Your Honor. And I'll be very  
17 brief.

18 THE COURT: Okay. Famous last words by lawyers. I'm  
19 going to hold you to this. Let's do it.

20 MR. DENNIE: I'm going to do my best.

21 So at the very end of discussion there, there  
22 was a conversation about the shortly after language.

23 THE COURT: The six weeks versus three weeks, that one?

24 MR. DENNIE: Well, it was actually after that, about  
25 how there's no meeting of the definition of shortly after



1 because the injury occurred --

2 THE COURT: Okay.

3 MR. DENNIE: -- October 31st, 2004. And I just want to  
4 be clear on something 'cause counsel asked -- we had this same  
5 conversation last week, and I pointed him to the same thing  
6 that I would point you-all to, Appendix 6, which is the  
7 decision letter of the Board that we're talking about here  
8 today, November 23rd, 2016. This is what the Groom law firm  
9 wrote. As Mr. Meehan said, they wrote this.

10 "She stated that you 'became disabled' in 2005  
11 while playing for the New York Giants due to cumulative mental  
12 disorder."

13 So the point I'm trying to make here -- and I  
14 know they were trying to argue the merits on that one, but this  
15 is their own letter where we're saying the application  
16 references 2005. And it is a circumstance where he had the  
17 injury -- the basis, the underlying injury occurred in 2004,  
18 October 31st. But he returned to play within 48 hours and  
19 continued taking those hits which ultimately resulted in an  
20 impact exam conducted by the New England Patriots. Whether  
21 it's three weeks or four or five or six, it wasn't very long.  
22 It was a very short period of time.

23 So my request on that issue, Your Honor, is if  
24 that is not clear to the Court that we're making the comment  
25 and statement that the injury, the main injury occurred on

1 the -- in 2004 but continue for multiple cumulative hits, that  
2 we be permitted to amend on that issue.

3 THE COURT: Amend what?

4 MR. DENNIE: The complaint, to make it clear what we're  
5 saying. I mean, it's all spelled out in the facts, but we want  
6 to be able to make it clear --

7 THE COURT: Okay. Well...

8 MR. DENNIE: And we've been --

9 THE COURT: So you're essentially doing a motion for  
10 leave to amend, and we'll take that up later. Anything further  
11 with respect to the motion to compel?

12 MR. DENNIE: Okay. So the -- the other issue I wanted  
13 to point out. There was a lot of discussion, Your Honor,  
14 about, you know, blackletter law and the Fifth Circuit has said  
15 this and you can't do anything more. I want to be clear, Your  
16 Honor. As I pointed out earlier, you stuck pretty tight to the  
17 language that appears in *Crosby* in your order to us on  
18 July 22nd.

19 The *Vega* court discussed review of the  
20 administrative record, review of how the administrator has  
21 interpreted the plan in the past, and review of information  
22 that would assist the Court in understanding medical terms and  
23 information. That's what *Vega* said.

24 *Crosby* followed and expanded that because it  
25 specifically says, quote, *Vega* does not, however, prohibit the

1 admission of evidence to resolve other questions that may be  
2 raised in an ERISA action. And it goes on to say, quote, A  
3 claimant may question the completeness of the administrative  
4 record, one; two, whether the plan administrator complied with  
5 ERISA procedural regulations; and, three, the existence and  
6 extent of a conflict of interest created by a plan  
7 administrator's dual role making benefits determinations and  
8 funding the plan.

9 Then the case goes on and says we see no reason  
10 to limit the admissibility of evidence on these matters to that  
11 contained in the administrative record in part because we can  
12 envision situations where evidence resolving these disputes may  
13 not be contained in the administrative record.

14 It's essentially what your order says. So this  
15 is not blackletter law, we're going to overturn you if you  
16 grant the discovery that's being requested. The discovery here  
17 is extremely important.

18 THE COURT: Okay. You're getting into argument. What  
19 else?

20 MR. DENNIE: The only other thing I would add is --

21 THE COURT: I meant repetitive argument.

22 MR. DENNIE: Yeah. I won't belabor that point. The  
23 only other thing that I wanted to address was the reference to  
24 the database being thousands of claims per year. There are a  
25 bunch of different types of claims that can be submitted.

1 Mr. Vincent specifically indicated he could run a query for  
2 total and permanent disability, which is a much smaller  
3 category.

4 We don't want to know if someone had a pension  
5 issue or some other issue that presented to the Plan. We don't  
6 care about that. We want to know the information on total and  
7 permanent disability. That's what we want. That's where we  
8 would get the information to help us understand if there was  
9 inconsistency in the application, which is a component of  
10 arbitrary and capriciousness and full and fair review. That's  
11 what we're after in this case, nothing more, nothing less.

12 We just want the information so we can go after  
13 those very standards that the Fifth Circuit has set out.

14 THE COURT: Okay. Anything else?

15 MR. DENNIE: That's it. Thank you.

16 THE COURT: Anything further in reply to the reply?

17 MR. MEEHAN: No, because I know we're going to have  
18 that opportunity in the supplemental filing --

19 THE COURT: Yes, you will.

20 MR. MEEHAN: -- so I won't do that. I did have one  
21 question.

22 THE COURT: Yes.

23 MR. MEEHAN: Perhaps the Court is following, but I now  
24 understand from Plaintiff's counsel that this query they want  
25 run of the database is limited to total and permanent

1 disability claims, but what does that mean? I'm not following.

2 We would generate a list, I guess names  
3 redacted so we protect people's information and say there were  
4 300 or 200 or 4 or 11,000 or whatever the number is. Is that  
5 what we would be asked to do? And to -- to what end would that  
6 help anyone?

7 MR. DENNIE: May I answer?

8 THE COURT: No. We're done. We're done with the  
9 argument on the motion to compel. I'll go off the record and  
10 bring up scheduling items.

11 Let's go off the record.

12 (Off the record.)

13 THE COURT: Let's go back on the record.

14 Counsel, the Court will entertain supplemental  
15 briefing on the issue of the motion to compel and some issues  
16 that were raised during this hearing and some not. But what  
17 the Court is particularly interested in is as follows: I would  
18 like each side to address the exceptions to allow discovery in  
19 ERISA case under -- the two exceptions under *Vega* and the three  
20 in *Crosby*. From the Plaintiff's side, obviously, you touched  
21 on at the very end what would allow discovery and what that is.  
22 And on the Plan side, why none of the exceptions articulated in  
23 *Vega* and *Crosby* apply here. Okay?

24 Also, with respect to the Plaintiff, the Court  
25 would ask you to identify with specificity the procedural --

1 ERISA procedural regulations that you claim were not complied  
2 with, with specificity.

3 In addition, both sides today referenced  
4 depositions that were recently taken and transcripts that were  
5 received even more recently. Some of this was set forth and  
6 attached to the reply. And, quite frankly, the Court has no  
7 intention to read 9,000 pages of depositions; however, probably  
8 should get -- we'll discuss format later -- an actual set of  
9 the deposition. So not that I want to double-check everything  
10 that you say, but I will.

11 If you're using portions of the deposition to  
12 support or respond to what was said during this hearing  
13 relative to the motion to compel -- because I think it's tied  
14 to the -- a lot of the motion to compel, which was filed after  
15 the three depositions were taken, were in response to answers  
16 that were received or not received, allegedly, in connection  
17 with the depositions.

18 So if you could be very specific, build it into  
19 your pleading and provide the Court -- you can decide between  
20 the two of you, you know, providing the Court with a copy that  
21 we can search. But when you are saying that a certain  
22 deposition supports your position, identify it by page, line or  
23 whatever to make it easily searchable by the Court and quote  
24 from it. Okay?

25 Those are the areas that I would like

1 supplemental briefing on.

2 Let's go off the record.

3 (Off the record.)

4 THE COURT: Let's go back on the record.

5 So with respect to the supplemental briefing,  
6 you-all can submit, if you choose, if there's anything more  
7 that you like the Court to consider. Supplemental briefing, we  
8 discussed maybe an affidavit, all that can be by Friday, the  
9 10th of September. The sooner the better but that's the  
10 deadline.

11 Off the record.

12 (Off the record.)

13 THE COURT: Let's go on the record.

14 Counsel, with respect to the current scheduling  
15 order on this case, which sets trial on December 8th, is it, or  
16 6th?

17 MR. DENNIE: The three-week docket starts on the 6th.

18 THE COURT: You will not be reached at that time.

19 Let's go off the record.

20 (Off the record.)

21 THE COURT: On the record.

22 The Court is aware that a motion for summary  
23 judgment has been filed on behalf of the Defendant. The  
24 response time will be the three weeks from the date it was  
25 filed is set aside. And, again, a new deadline will be set

1     forth on that by the Court. It'll be a minimum of three weeks  
2     after the Court rules on this, but it may be longer. All  
3     right? So as far as responsive documents to the summary  
4     judgment, that is a waste of time at this time. So that's on  
5     the record.

6             MR. MEEHAN: Your Honor, may I?

7             THE COURT: On record?

8             MR. MEEHAN: Yes.

9             THE COURT: Go ahead.

10            MR. MEEHAN: We're on the record, yes?

11            THE COURT: Yes.

12            MR. MEEHAN: May I -- I think I appreciate where the  
13     Court is going, and I think I'm following it. But it would be  
14     helpful, I suggest, in the context of determining what, if any,  
15     discovery the Court believes should go forward, both to  
16     consider this concept of the exceptions in the Fifth Circuit  
17     and whether any apply but also whether any is needed under  
18     Rule 56 to address summary judgment. Because even --

19            THE COURT: So what are you asking me?

20            MR. MEEHAN: Well, what -- I guess what I'm asking is  
21     that -- is that rather than suspend the time to respond to  
22     summary judgment, that a date be placed for a response. And as  
23     part of the response, Plaintiff can identify that --

24            THE COURT: No, I'm not inclined to do that.

25            MR. MEEHAN: Okay.



1 THE COURT: I'm going to stick with what I said.

2 MR. MEEHAN: Okay. I just wanted to raise the Rule 56  
3 procedure, but I understand that the Court is not going --

4 THE COURT: No. The Plaintiff either on the record, I  
5 believe you did, but it might have been off the record, moved  
6 orally for extended time to file a response to the motion for  
7 summary judgment, and that oral motion is granted.

8 As far as the deadline, the Court will get back  
9 to you with a deadline after the Court makes a ruling on this  
10 discovery. But it will be no sooner than three weeks after the  
11 Court makes a ruling, but it could be longer.

12 Off the record.

13 (Off the record.)

14 THE COURT: Back on the record.

15 Since the trial date is lifted, there are  
16 deadlines that we discussed earlier. Obviously, deadlines for  
17 pretrial material, close of discovery, possibly supplementing  
18 the administrative record and so on, these will be revisited  
19 after the Court decides the matter before the Court. So we've  
20 got a little bit of work to do. You-all have about two and a  
21 half weeks to do it and then it will get in line with  
22 everything else the Court has on its plate. I hope to get to  
23 it soon, but we'll see. Okay?

24 Off the record.

25 (Off the record.)

1 THE COURT: On the record.

2 If counsel for Defendant finds, in light of  
3 what is before the Court right now and discovery that was had  
4 and for any reason that counsel would like to have a new  
5 summary judgment, amended summary judgment, leave is granted  
6 right now for that.

7 And so everything's lifted right now. So we  
8 have a pending motion for summary judgment. There's no  
9 deadline yet because there's homework assignments for you-all,  
10 and then I'll have a homework assignment. The Court will  
11 either go ahead and put it back on the schedule -- and you can  
12 stand by your original motion for summary judgment, or you have  
13 leave to file a new summary judgment. You can get back to us  
14 how much time you need on that.

15 MR. MEEHAN: Okay.

16 THE COURT: Leave is granted --

17 MR. MEEHAN: Thank you, Your Honor.

18 THE COURT: -- if that happens.

19 MR. MEEHAN: Thank you, Your Honor.

20 THE COURT: Off the record.

21 (Off the record.)

22 THE COURT: Back on the record.

23 It's the Court's anticipation that we'll be  
24 issuing a brand-new scheduling order with input from the  
25 lawyers once we get past this discovery issue, or set of

1 issues. Everybody understand?

2 MR. DENNIE: Yes, Your Honor.

3 MR. MEEHAN: Yes, Your Honor.

4 THE COURT: Off the record.

5 (Off the record.)

6 THE COURT: Counsel, is there anything else that you  
7 would like to say or need to say on the record on behalf of  
8 your client? Plaintiff?

9 MR. DENNIE: No, Your Honor. Thank you for your time.

10 THE COURT: On behalf of the Plan?

11 MR. MEEHAN: No, Your Honor. Thank you.

12 THE COURT: If you want to talk to my court reporter  
13 about transcript for today, she's here; otherwise, you-all stay  
14 safe and we'll see you next time.

15 SECURITY OFFICER: All rise.

16 (WHEREUPON, the proceedings were adjourned.)

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REPORTER'S CERTIFICATE

I, Thu Bui, CRR, RMR, Official Court Reporter,  
United States District Court, Northern District of Texas, do  
hereby certify that the foregoing is a true and correct  
transcript, to the best of my ability and understanding, from  
the record of the proceedings in the above-entitled and  
numbered matter.

/s/ Thu Bui  
Official Court Reporter